LETCHUMANAN CHETTIAR ALAGAPPAN (AS EXECUTOR TO SL ALAMELOO ACHI (DECEASED)) & ANOR v. SECURE PLANTATION SDN BHD

FEDERAL COURT, PUTRAJAYA
ZULKEFLI AHMAD MAKINUDIN PCA
ZAINUN ALI FCJ
AZAHAR MOHAMED FCJ
BALIA YUSOF WAHI FCJ
JEFFREY TAN FCJ
[CIVIL APPEAL NO: 02-78-10-2014]
13 APRIL 2017

CIVIL PROCEDURE: *Pleadings – Forgery – Claim that signatures and thumbprints in power of attorney in sale of land forged – Word 'fraud' not pleaded in pleadings – Whether necessary to plead word 'fraud' when facts which make conduct fraudulent were already pleaded – Whether complaint of forgery amounted to complaint of fraud – Rules of Court 2012, O. 18 rr. 8(1) & 12(1)(a)*

EVIDENCE: *Burden of proof – Fraud – Forgery – Signatures and thumbprints in power of attorney in sale of land forged – Whether burden of proof in fraud and forgery cases same – Whether burden of proof was beyond reasonable doubt or balance of probabilities – Whether complaint of forgery amounted to complaint of fraud*

EVIDENCE: *Expert evidence – Handwriting expert – Signatures and thumbprints in power of attorney in sale of land forged – Whether there was authenciation by handwriting expert – Whether finding of forgery could be made without opinion evidence of handwriting expert – Whether court could make comparison if feature of writing and signature on documents were so glaring – Whether power of attorney valid – Evidence Act 1950, ss. 45, 47 & 73 – Powers of Attorney Act 1949, ss. 3 & 4*

The first appellant was the executor of the will of one deceased S Alameloo who owned a piece of land ('the land') while the second appellant was the former's attorney. By a sale and purchase agreement ('the SPA'), the purported attorney of the first appellant ('Kalidas'), pursuant to a power of attorney ('the POA'), agreed to sell the land to the respondent. After the respondent paid the purchase price, Kalidas executed the memorandums of transfer of the land in favour of the respondent and presented the memorandum of charge by the respondent, in favour of the lender, for registration. However, both instruments were rejected for registration by the Registrar of Titles. The second appellant lodged a private caveat to prohibit the registration of any dealing on the land. Following an inquiry, the Registrar of Titles intervened and lodged a Registrar's caveat. A new document of land title was issued to the first appellant. The respondent filed an action at the High Court for specific performance of the SPA and for damages against, *inter alia*, the appellants. The first appellant filed a separate action against Kalidas to 'cancel' the POA as it was alleged that (i) Kalidas was not his appointed attorney; (ii) all documents to effectuate the transfer of the land were forgeries; (iii) his alleged signatures or thumb prints were

forgeries; and (iv) the purchase of the land by the respondent was based on forged instruments. The parties agreed that the action for specific performance would bind the action to cancel the POA. At the High Court, the primary issue that arose was whether the POA was valid. There was no form of authenciation to substantiate the POA but this was ignored by the High Court. The High Court opined that (i) the first appellant did not challenge the signature on the POA and failed to plead fraud; (ii) the POA was valid because it was registered and therefore, the exercise of the purported powers by Kalidas was valid and in compliance with ss. 3 and 4 of the Powers of Attorney Act 1949 ('the POA Act') and s. 85 of the Evidence Act 1950 ('the Act 1950'). In allowing specific performance against the appellants, the High Court went on to hold that fraud/forgery was not proved beyond reasonable doubt and the respondent was entitled to rely on the POA. The appellants appealed but the attempt proved futile at the Court of Appeal. The Court of Appeal held that the respondent was a *bona fide* purchaser and once it was proved that the respondent was a *bona fide* purchaser, the burden was upon the appellants to prove the defence. Hence, the present appeal. The questions of law raised before the court were (i) whether a complaint of forgery in civil proceedings was necessarily in law a complaint of fraud; (ii) whether a court could treat a complaint forgery as a complaint of fraud given the differing standards of proof between the two in civil proceedings; (iii) whether a case of forgery could only be proved by means of the opinion of a handwriting expert; (iv) whether it was correct in law to cast the burden of proving the sale of a property was not genuine on the plaintiff or alleged vendor; and (v) whether the burden of proving that he was a *bona fide* purchaser for value without notice was rightfully to be placed on the purchaser.

Held (allowing appeal)
Per Jeffrey Tan FCJ delivering the judgment of the court:

(1) Order 18. r. 8(1) read together with r. 12(1)(a) of the Rules of Court 2012 requires a specific plead of fraud as well as the particulars of fraud. It is not always necessary to plead the word 'fraud' if the facts which make the conduct fraudulent are pleaded. 'Fraud' is a generic term that covers all manner of cheat, deceit and dishonesty. The appellant did not plead the word 'fraud' in the generic sense but pleaded 'fraud' in the specific sense of 'forgery'. Given that 'forgery' was pleaded, it could not be said that 'fraud' was not pleaded at all. 'Forgery' is a specific method of 'fraud' and is 'fraud' in every sense of the word. A complaint of forgery is a complaint of fraud. (paras 17, 18, 31 & 93)

(2) The High Court held that fraud/forgery was not proved beyond reasonable doubt. This was the wrong standard of proof for forgery. A complaint of forgery is a complaint of fraud. Therefore, the standard of proof for fraud and forgery in a civil proceeding is balance of probabilities. (paras 33 & 34)

(3) There was no opinion evidence from a handwriting expert. However, the courts below should have considered the totality of the evidence, the evidentiary facts and made the inferences and not just dismiss them as being of no probative value. Furthermore, a finding of forgery could be made without the opinion evidence of a handwriting expert, be it in civil or criminal proceedings. The modes of proof envisaged in ss. 45 and 47 of the Act are not exclusive for proving the genuineness or authorship of a document. Comparison may be made by (i) a handwriting expert under s. 45 of the Act; (ii) anyone familiar with the handwriting of the persons concerned, as provided by s. 47 of the Act; or (iii) the court itself under s. 73 of the Act. If the feature of writing and signature on the documents are so glaring, the court can form an opinion by itself and further exercise under s. 45 may virtually become unnecessary or futile. (paras 91 & 92)

(4) The burden and onus to prove that a sale is genuine is on the pursuer, that is, the party who asserts that the sale is genuine. The claim was for specific performance of the SPA executed by the supposed attorney of the first appellant. The respondent had to prove that the SPA was indeed executed by the lawful attorney of the first appellant. Proof of *bona fide* purchaser could not make out a *prima facie* case to shift the onus of proof to the appellants. The cause of action was not admitted. Given so, the respondent had to discharge the burden as well as the initial onus before the onus could shift to the appellants. If the respondent had not discharged that burden and onus of proof, then the claim should be dismissed, regardless of whether the defence of forgery had or had not been made out. The appellants disputed that Kalidas was the lawful attorney of the first appellant. Hence, the respondent had the initial onus to prove that Kalidas was the lawful attorney who had the authority to bind the appellants. (paras 52, 53, 62 & 115)

(5) The respondent had the burden as well as the initial onus of proof, which never shifted, to make out a *prima facie* claim for specific performance. There was no onus to prove forgery and or fraud if the validity of the POA, the claim for specific performance had no leg to stand on, regardless of whether the defence of forgery and/or fraud had or had not been proved. To impose the burden on the appellants to prove forgery and/or fraud, when proof of *bona fide* purchaser was wholly immaterial and when the validity of the POA was not proved, was a serious misdirection on the burden of proof. (para 71)

Bahasa Malaysia *Headnotes*

Perayu pertama adalah pentadbir wasiat seorang bernama S Alameloo yang telah meninggal dunia dan meninggalkan sebidang tanah ('tanah') manakala perayu kedua adalah wakil perayu pertama. Melalui satu perjanjian jual beli ('PJB'), seorang yang kononnya mewakili perayu pertama ('Kalidas') bawah surat kuasa wakil ('SKW'), bersetuju menjual tanah tersebut kepada

responden. Selepas responden membayar harga belian, Kalidas memeterai memorandum pindah milik tanah kepada responden dan mengemukakan memorandum pajakan responden, sebagai peminjam, bagi pendaftaran. Walau bagaimanapun, pendaftaran kedua-dua instrumen ditolak oleh Pendaftar Hak Milik. Perayu kedua memasukkan kaveat persendirian untuk menghalang pendaftaran apa-apa urusan tanah. Berikutan satu inkuiri, Pendaftar Hak Milik mencelah dan memasukkan kaveat Pendaftar. Satu dokumen hak milik tanah dikeluarkan buat perayu pertama. Responden memfailkan satu tindakan di Mahkamah Tinggi bagi pelaksanaan spesifik PJB dan bagi ganti rugi terhadap, antara lain, perayu-perayu. Perayu pertama memfailkan tindakan berasingan terhadap Kalidas untuk membatalkan SKW atas hujahan (i) Kalidas bukan wakil yang dilantik; (ii) kesemua dokumen pelaksanaan tanah dipalsukan; (iii) tandatangan atau cap jarinya telah dipalsukan; dan (iv) pembelian tanah oleh responden adalah berasaskan instrumen yang dipalsukan. Pihak-pihak bersetuju bahawa tindakan pelaksanaan spesifik akan mengikat tindakan membatalkan SKW. Di Mahkamah Tinggi, isu utama yang timbul adalah sama ada SKW sah. Tiada apa-apa pengesahan dibuat untuk mengesahkan SKW tetapi ini diabaikan oleh Mahkamah Tinggi. Mahkamah Tinggi berpendapat (i) perayu pertama tidak mencabar tandatangan pada SKW dan gagal memplidkan penipuan; (ii) SKW sah kerana didaftarkan dan dengan itu, penjalanan kuasa yang didakwa oleh Kalidas sah dan mematuhi ss. 3 dan 4 Akta Surat Kuasa Wakil 1949 ('Akta SKW') dan s. 85 Akta Keterangan 1950 ('Akta'). Dalam membenarkan pelaksanaan spesifik terhadap perayu-perayu, Mahkamah Tinggi seterusnya memutuskan penipuan/pemalsuan tidak dibuktikan melampaui keraguan munasabah dan responden boleh bersandar pada SKW. Perayu-perayu merayu terhadap keputusan tersebut di Mahkamah Rayuan tetapi tidak berjaya. Mahkamah Rayuan memutuskan responden adalah pembeli suci hati dan apabila terbukti responden adalah pembeli suci hati, beban terletak pada perayu-perayu untuk membuktikan pembelaan. Maka timbul rayuan ini. Soalan-soalan perundangan yang dibangkitkan di mahkamah adalah (i) sama ada dakwaan pemalsuan dalam prosiding sivil adalah dakwaan penipuan bawah undang-undang; (ii) sama ada mahkamah boleh menganggap dakwaan pemalsuan sebagai dakwaan penipuan memandangkan standard pembuktian keduanya dalam prosiding sivil adalah berbeza; (iii) sama ada kes pemalsuan hanya boleh dibuktikan oleh pendapat pakar tulisan tangan; (iv) sama ada betul di bawah undang-undang untuk mengenakan beban membuktikan jualan hartanah adalah palsu pada plaintif atau penjual yang didakwa; dan (v) sama ada beban membuktikan bahawa dia adalah pembeli suci hati bagi satu nilai tanpa notis dengan betul terletak pada pembeli.

Diputuskan (membenarkan rayuan)
Oleh Jeffrey Tan HMP menyampaikan penghakiman mahkamah:

(1) Aturan 18 k. 8(1) dibaca bersekali dengan k. 12(1) Kaedah-Kaedah Mahkamah 2012 mengkehendaki agar penipuan dan butirannya diplidkan. Perkataan 'penipuan' tidak semestinya perlu diplidkan jika

fakta yang menjadikan pelakuan itu satu penipuan telah diplidkan. 'Penipuan' adalah satu terma generik yang meliputi semua pelakuan menipu, memperdaya dan tidak jujur. Perayu tidak memplidkan perkataan 'penipuan' dalam konteks generik tetapi memplidkan 'penipuan' dalam konteks 'pemalsuan'. Memandangkan 'pemalsuan' diplidkan, tidak boleh dikatakan 'penipuan' tidak diplidkan langsung. 'Pemalsuan' adalah cara spesifik 'penipuan' dan adalah 'penipuan' dalam erti kata perkataan tersebut. Dakwaan pemalsuan adalah dakwaan penipuan.

(2) Mahkamah Tinggi memutuskan penipuan/pemalsuan tidak dibuktikan melampaui keraguan munasabah. Ini standard pembuktian pemalsuan yang salah. Dakwaan pemalsuan adalah dakwaan penipuan. Oleh itu, standard pembuktian penipuan dan pemalsuan dalam prosiding sivil adalah atas imbangan kebarangkalian.

(3) Tiada keterangan pendapat oleh pakar tulisan tangan. Walau bagaimanapun, mahkamah bawahan sepatutnya mempertimbangkan keseluruhan keterangan, fakta-fakta bukti dan membuat kesimpulan dan bukan menolaknya dengan alasan tiada nilai probatif. Tambahan lagi, satu dapatan pemalsuan boleh dibuat tanpa keterangan pendapat oleh pakar tulisan tangan, baik dalam prosiding sivil mahupun jenayah. Cara pembuktian yang dibayangkan dalam ss. 45 dan 47 Akta tidak eksklusif untuk membuktikan ketulenan penulisan dokumen. Pembezaan boleh dibuat oleh (i) pakar tulisan tangan bawah s. 45 Akta; (ii) sesiapa yang biasa dengan tulisan tangan orang yang terlibat, seperti yang diperuntukkan oleh s. 47 Akta; atau (iii) mahkamah sendiri bawah s. 73 Akta. Jika ciri-ciri penulisan dan tandatangan pada dokumen amat ketara, mahkamah boleh membentuk pendapatnya sendiri dan seterusnya penjalanan lanjut bawah s. 45 tidak lagi diperlukan atau menjadi sia-sia.

(4) Beban dan tanggungjawab membuktikan jualan adalah tulen terletak pada pencadangnya iaitu pihak yang menyatakan bahawa jualan adalah tulen. Tuntutan pelaksanaan spesifik PJB dilaksanakan oleh orang yang dikatakan wakil perayu pertama. Responden-responden perlu membuktikan PJB sememangnya dilaksanakan oleh wakil perayu pertama yang sah. Pembuktian pembeli suci hati tidak membuktikan kes *prima facie* untuk mengalihkan tanggungjawab kepada perayu-perayu. Kausa tindakan tidak diakui. Oleh itu, responden perlu melepaskan beban dan juga tanggungjawab asal sebelum tanggungjawab tersebut beralih kepada perayu-perayu. Jika responden tidak melepaskan beban dan tanggungjawab pembuktian, tuntutan tersebut wajar ditolak tanpa mengira sama ada pembelaan pemalsuan berjaya dibuktikan atau tidak. Perayu-perayu mendalihkan Kalidas adalah wakil sah perayu pertama. Maka responden mempunyai tanggungjawab asal membuktikan Kalidas adalah wakil sah yang berkuasa mengikat perayu-perayu.

(5) Responden mempunyai beban serta tanggungjawab asal pembuktian, yang tidak beralih, untuk membuktikan tuntutan *prima facie* bagi pelaksanaan spesifik. Tidak timbul tanggungjawab membuktikan pemalsuan atau penipuan jika kesahan SKW, tuntutan pelaksanaan spesifik berdiri tidak berkaki, tanpa mengira sama ada atau tidak pembelaan pemalsuan dan/atau penipuan berjaya dibuktikan atau tidak. Untuk mengenakan beban membuktikan pemalsuan dan/atau penipuan pada perayu-perayu, sedangkan pembuktian pembeli suci hati langsung tidak material dan apabila kesahan SKW tidak terbukti, adalah satu salah arah beban pembuktian.

Case(s) referred to:

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Abillah Labo Khan v. PP [2002] 2 CLJ 521 CA ***(refd)***
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Abu Bakar Mohd Kassim & Ors v. Mohd Yusoff Mohd Kassim [2016] 1 LNS 247 CA ***(refd)***
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Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***
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Ardeshir v. Flora Sasson AIR 1928 PC 208 ***(refd)***
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Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA ***(refd)***
Bank Pertanian Malaysia Bhd v. Nora'rifah Darus [2014] 7 CLJ 631 CA ***(refd)***
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Britestone Pte Ltd v. Smith & Associates Far East, Ltd [2007] 4 SLR 855
Bumiputra-Commerce Bank Bhd v. Augusto Pompeo Romei & Anor [2014] 6 CLJ 17 CA ***(refd)***
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Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Dato' Robert Teo Keng Tuan v. Metroplex Bhd [2013] 9 CLJ 681 FC ***(refd)***
Davies v. Taylor [1974] 1 AC 207 ***(refd)***
Davy v. Garrett (1878) 7 Ch D 473 ***(refd)***
Derry v. Peek (1889) 12 App Cas 377 ***(refd)***
Doe d Devine v. Wilson (1855) 10 Moo PC 502 ***(refd)***
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Garden Neptune v. Occidental [1989] 1 Lloyd's Rep 305 ***(refd)***
Great Eastern Life Assurance (Malaysia) Bhd v. Siu Yan Tam & Anor And Another Appeal [2014] 4 CLJ 666 CA ***(refd)***
Green v. Nixon (1857) 23 Beav 530 ***(refd)***

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Higashigi Industrial Company Limited v. Leung Luen Kai & Anor [2012] HKCU 956 ***(refd)***
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Liang Jun Xian v. Tsui Hin Chi [2011] HKCU 179 ***(refd)***
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Mijatovic v. Legal Practitioners Complaints Committee (2008) WASCA 115 ***(refd)***
Ming Shiu Chung & Ors v. Ming Shiu Sum & Ors [2005] HKCU 809 ***(refd)***
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Mohima Chunder Dhur v. Jugal Kishore Bhuttcharji (1881) ILR 7 Cal 736 ***(refd)***
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PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
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Wan Salimah Wan Jaffar v. Mahmood Omar; Anim Abdul Aziz (Intervener) [1998] 1 CLJ 480 HC ***(refd)***
Wee Yue Chew v. Su Sh-Hsyu [2008] SGHC 50 ***(refd)***
Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Hussin [1997] 3 CLJ 854 CA ***(refd)***
Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***
Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229 FC ***(refd)***
Zimmer Sweden AB v. KPN Hong Kong Ltd And Anor [2016] 2 HKC 282 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 17
Criminal Procedure Code, s. 418A
Evidence Act 1950, ss. 45, 47, 73(1), 85, 101(1), 102, 103, 114(g)
Federal Constitution, art. 121(1)
National Land Code, ss. 340(2)(b), (c), (3), 346(5)
Penal Code, s. 298A
Powers of Attorney Act 1949, ss. 3(2), 4, First Schedule
Rules of Court 2012, O. 14 r. 1(2)(b), O. 18 rr. 8(1), 12(1)(a)
Securities Commission Malaysia Act 1993, s. 39(2)
Securities Industry Act 1983, s. 126(2)

Government of Wales Act 1998 [UK], s. 110
Indian Evidence Act 1872 [India], ss. 101, 102
Northern Ireland Act 1998 [UK], s. 81
Scotland Act 1998 [UK], s. 102
The Rules of the High Court [Hong Kong], O. 14 r. 1(2)(b)

Other source(s) referred to:
Annotated Statues of Malaysia, vol 7, p 3057
Bullen & Leake & Jacobs Precedents of Pleadings, 18th edn, vol 2, pp 57-01
Kerr on Fraud and Mistake, 7th edn, p 1
Lord Devlin, *Judges and Lawyers*, Modern Law Review 1976, vol 39, pp 10, 13
Malaysian Civil Procedure 2013, para 14/1/6
Sarkar Law of Evidence, 16th edn, pp 1590, 1593
The Law Quarterly Review, vol 120, p 8
Woodroffe and Amir Ali, Law of Evidence 19th edn, vol 3, pp. 3189 - 3191, 3194, 3203
Woodroffe and Amir Ali, vol 2, pp 2236, 2237

For the appellants - Cyrus Das, K Ramesh & Lynn Johnson; M/s Chellam Wong
For the respondent - Cecil Abraham, Sunil Abraham, Tung Mun Yeong & Ellaine Alexander; M/s Tung, Chan & Partners

Reported by Najib Tamby

JUDGMENT

Jeffrey Tan FCJ:

[1] Leave was granted to the appellants to raise the following "questions of law" before this court:

(a) Whether a complaint of forgery in civil proceedings is necessarily in law a complaint of fraud?

(b) Whether it is correct in law for a court to treat a complaint of forgery as a complaint of fraud given the differing standards of proof presently in civil proceedings between forgery and fraud?

(c) Whether a case of forgery can only be proved by means of the opinion of a handwriting expert?

(d) Whether it is correct in law to cast the burden of proving that the sale of a property was not genuine on the plaintiff or alleged vendor?

(e) Arising from the question above, whether the correct position in law is that the burden of proving that he is a *bona fide* purchaser for value without notice is rightfully to be placed on the purchaser?

(f) Whether a *bona fide* purchaser for value can be registered as a proprietor of a land in a situation where a formal transmission from a deceased to a personal representative pursuant to s. 346(5) of the National Land Code, was not registered?

[2] The undisputed background facts could be paraphrased as follows. S Alameloo Achi Alias Sona Lena Alamelo Achi (deceased) was the registered owner of land measuring 39.31 acres and held under Geran 98602 for Lot 725 Bandar Kulim (said land). The first appellant was the executor of the will of the deceased. The second appellant was the lawful attorney of the first appellant. By written agreement dated 4 September 2009 (SPA), Kalidas a/l Komarawelo (Kalidas), as purported attorney of the first appellant pursuant to a power of attorney No 1938/09 (impugned PA), agreed to sell the said land to the respondent at the price of RM5,650,862.09. The respondent paid the contractual deposit of RM564,941.14 to Tetuan M Raman & Associates, solicitors for Kalidas. Thereafter, the respondent secured a bank loan of RM2.8m to finance its purchase of the said land, and paid the differential sum between the balance purchase price and loan sum to Tetuan M Raman & Associates. On 5 January 2010, the memorandum of transfer of the said land executed by Kalidas, purportedly as attorney of the first appellant, in favour of the respondent, and the memorandum of charge by the respondent in favour of the lender bank were presented for registration. But both instruments were rejected for registration by the Registrar of Titles. On 23 February 2010, the second appellant lodged a police report that the first appellant had not executed any instrument/ document of transfer of the said land to the respondent, and that any such

instrument/document was false. And on 25 February 2010, the second appellant lodged a private caveat to prohibit the registration of any dealing of the said land. The Registrar of Titles intervened and lodged a registrar's caveat and issued, after due inquiry conducted on 8 March 2010, a new document of land title to the first appellant. In response, the respondent on 16 May 2010 filed action (High Court at Alor Setar Civil Suit 21-10-2010) for specific performance of the SPA and for damages against (i) the appellants (as first and sixth defendants), (ii) Kalidas (as second defendant), (iii) the partners as well as the firm of Tetuan M Raman & Associates (as third to fifth defendants), and (iv) the Registrar of Titles (as seventh defendant). Soon thereafter, on 25 June 2010, the first appellant filed a separate action (High Court at Pulau Pinang OS 24-1067-2010) against Kalidas to "cancel" the impugned PA on grounds that the impugned PA was void *ab initio* and or forged. The respondent applied to intervene in OS 24-1067-2010. On 23 August 2011, the High Court at Pulau Pinang granted leave to the respondent to intervene in OS 24-1067-2010 and ordered that OS 24-1067-2010 be transferred to the High Court at Alor Setar for hearing together with Civil Suit 21-10-2010. OS 24-1067-2010 was eventually re-registered at the High Court at Alor Setar as OS 22-210-08-2012. But OS 24-1067-2010 or OS 22-210-08-2012 was not heard together with CS 21-10-2010. In fact, OS 24-1067-2010 or OS 22-210-08-2012 was not heard at all, as all parties agreed that the decision in CS 21-10-2010 would bind OS 22-210-08-2012. That is to say that all parties agreed that the decision in the action for specific performance would bind the action to cancel the impugned PA. Contrary to the intitulement of the appeal record, the action for specific performance was not heard together with the action to cancel the impugned PA. Only the action for specific performance was heard by the trial court. Except that all parties (appellants, respondent, and Kalidas included) agreed that the decision in the action for specific performance would bind the action to cancel the impugned PA (see para. 2 of the judgment of the trial court).

[3] Apart from the aforesaid background facts, the trial court related that the parties also testified to the following: (a) respondent - In total, the respondent paid about RM300,000 towards the stamp duty and the registration fee payable for the registration of transfer and charge of the said land. On 5 January 2010, the respondent paid the differential sum (RM2,285,775.88) between the balance purchase price and loan to Tetuan M Raman & Associates. The bank would only release the loan sum upon registration of the charge. On 8 March 2010, the respondent was informed that the memorandum of transfer and memorandum of charge were rejected for registration by reason of the report of fraud by the second appellant. Since the transfer could not be registered, Tetuan M Raman & Associates agreed to return the differential sum to the respondent. But the cheque of Tetuan M Raman & Associates, was dishonoured, (b) appellants - The first appellant did not sign the impugned PA. The impugned PA and other instruments relied by the respondent to effect transfer of the said land were forgeries.

(c) Kalidas - The impugned PA was genuine. (d) third and fourth defendants - The documents relied by the respondent were in order for Kalidas to sell the said land. (e) The Registrar of Titles - The said transfer could not be registered, for reason that "P13 bukan salinan asal" (title was not original).

[4] It should have been obvious that the core issue between the appellants and respondent was whether the impugned PA was valid or fake/genuine. But that was only grasped by the trial court after much obfuscation and irresolution. Initially, at paras. 12-14 of its judgment, the trial court said that the issues between the appellants and respondent were (i) whether the respondent could rely on the authority of Kalidas to sell the said land, (ii) whether the respondent acted honestly or rashly in its purchase of the said land from Kalidas who was in possession of the impugned PA, and, (iii) whether the respondent was entitled to a transfer of the said land. But at para. 28 of its judgment, the trial court saw it differently and held that whether the claim could be allowed would call upon it to determine as to (i) whether the respondent was a *bona fide* purchaser, (ii) whether the impugned PA was genuine, (iii) whether the caveat lodged by the second appellant was valid, (iv) whether the Registrar of Titles could suspend or reject the transfer for registration. Only at long last, at para. 34 of its judgment, did it dawn upon the trial court that the core issue was whether the impugned PA was valid or fake/genuine.

[5] Recognition that the impugned PA was the core issue could not however be equated as understanding of the purport of a power of attorney. For it would appear that the trial court failed to appreciate, not even after it had come to terms with the core issue, that the purport of a power of attorney is that the person authorised to act is the agent of the person who granted the power of attorney and who authorised the former to act. At para. 36 of its judgment, the trial court opined that the dispute between the first appellant and Kalidas would not affect the obligation of Kalidas to the respondent under the SPA. That opinion on the obligation of Kalidas was not exactly correct, as the obligation of Kalidas to the respondent under the SPA was in his representative capacity, that is, if the impugned PA were genuine. But if the impugned PA were not genuine, then not only would the SPA not bind the first appellant, but the obligation or liability of Kalidas to the respondent would have to be in his personal capacity. Hence, it was not true, not without qualification, that the dispute between the first appellant and Kalidas would not affect the obligation of Kalidas to the respondent under the SPA.

[6] But more portentous was the fallacy that the impugned PA was valid ("adalah sah") because of the fact of its registration and that the exercise of purported powers by Kalidas was valid and in compliance with ss. 3 and 4 of the Powers of Attorney Act 1949 (PA Act) and with s. 85 of the Evidence Act 1950. At para. 37 of its judgment, the trial court bemoaned that there was yet no result on the police investigation of forgery of the first appellant's thumbprint and or signature, and that the appellants had not subpoenaed the

police to testify on its said investigation. The trial court remarked that the police would be independent witnesses to enlighten the court on the matter of the alleged fraud. Thus far, the trial court was well within the bounds of fair judicial comment. But the trial court then fell into the errors which put into question its finding on the validity of the impugned PA and the defence of forgery.

[7] The first error was the adverse inference drawn against the appellants on account of their so-called failure to summon the police to testify. It is settled law that an adverse inference "can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence" (*Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492 per Mohamed Azmi SCJ delivering the judgment of the court). But there was no evidence of the withholding or suppression of evidence. As a matter of fact, the trial court was informed that the outcome of police investigation on the alleged forgery of the first appellant's thumbprint and or signature was yet not at hand - "sebagaimana pihak-pihak sedia maklum, sehingga ke hari ini hasil siasatan mengenai pemalsuan tandatangan atau cap jari defendan pertama belum diperolehi". Given that it was yet not at hand, it would only be that the police, even if called to testify, would not have been able to further enlighten the court on the alleged forgery, such that it would have been wholly idle to call the police to testify. The police investigation was yet an unknown. Hence, there could not have been any conceivable motive on the part of the appellants (see *Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim* [2015] 2 CLJ 1037; [2015] 3 MLJ 609, where it was held by the Federal Court per Azahar Mohamed FCJ, delivering the judgment of the court, that given that the court could not detect even an oblique motive not to call any witness, it was therefore inappropriate to invoke the adverse presumption under s. 114(g) of the Evidence Act. It was wholly illogical to draw the adverse inference that evidence from the police, if adduced, would be adverse to the appellants. But that adverse inference was nonetheless drawn against the appellants.

[8] To compound its error, the trial court then jumped to the conclusion (see para. 37 of the judgment of the trial court) that the impugned PA was valid and that the exercise of purported powers by Kalidas was valid and in compliance with ss. 3 and 4 of the PA Act as well as with s. 85 of the Evidence Act, by reason of the fact of the registration of the impugned PA:

> P10 telah didaftarkan di Mahkamah Tinggi Pulau Pinang sebagai 1938/09 pada 0.6.03.2009. Dengan itu exhibit P10 adalah sah dan tindakan Defendan Kedua berlandaskan P10 adalah sah dan mematuhi kehendak Seksyen 3(1) dan 4(1) Powers of Attorney Act 1949 dan Seksyen 85 Akta Keterangan. Dalam membuat keputusan ini, Mahkamah dibimbing oleh kes *Melantrans Sdn Bhd v. Carah Enterprise Sdn Bhd & Anor* [2003] 2 CLJ 86 yang memutuskan bahawa 'Looking at the debenture in the appeal record, we are satisfied the said Power of Attorney complied with subsection 3(2) and 4(1) of the Powers of Attorney Act 1949.

[9] That latter reasoning was specious. The trial court believed that registration vested validity to the impugned PA. With respect, the registration of a power of attorney is a procedural requirement for the creation of a valid power of attorney. But it does not follow that once registered a power of attorney is valid or genuine. A forged power of attorney remains a forged instrument, notwithstanding its registration under the PA Act. The registration of a forged power of attorney will not turn it from fake to genuine. Whether the impugned PA was valid or fake or genuine could not be based on its registration or otherwise. Its validity should be based on the PA Act. It was an elemental error to hold that the impugned PA was valid (sah) because of its registration.

[10] We also take issue with the finding that the exercise of powers by Kalidas of the powers granted by the impugned PA was in compliance with ss. 3 and 4 of the PA Act and with s. 85 of the Evidence Act. Perhaps the trial court meant to say that the alleged powers granted by the impugned PA were exercised after due compliance with ss. 3 and 4 of the PA Act and that pursuant to s. 85 of the Evidence Act the court shall presume that the impugned PA was executed before and authenticated by a notary public. Be that as it may, we nonetheless find that the impugned PA, *albeit* its registration, had not complied with s. 3 of the PA Act, which provides:

> (1) No instrument purporting to create a power of attorney executed after the commencement of this Act shall have any validity to create such power within Peninsular Malaysia unless:
>
> (a) if executed within Peninsular Malaysia, the instrument is executed before, and is authenticated in the appropriate form set out in the First Schedule hereto by:
>
> (i) a Magistrate;
>
> (ii) a Justice of the Peace;
>
> (iii) a Land Administrator;
>
> (iv) a Notary Public;
>
> (v) a Commissioner for Oaths;
>
> (vi) an advocate and solicitor; or
>
> (vii) an officer, acting in the course of his employment, of a company carrying on the business of banking in Peninsular Malaysia and incorporated by or under any written law in force in Peninsular Malaysia; or
>
> (b) if executed outside Peninsular Malaysia, the execution of such instrument is authenticated, in such form as may be accepted by the Registrar, by:
>
> (i) a Notary Public;
>
> (ii) a Commissioner for Oaths;
>
> (iii) any Judge;

(iv) a Magistrate;

(v) a British Consul or Vice-Consul;

(vi) a representative of Her Britanic Majesty;

(vii) on and after Merdeka Day, any Consular Officer of Malaysia;

(viii) in the case of an instrument executed in the Kingdom of Saudi Arabia, the Malaysian Pilgrimage Commissioner; or

(ix) in the case of an instrument executed in the Republic of Singapore, an advocate and solicitor of the Supreme Court of the Republic; or an officer, acting in the course of his employment, of a company carrying on the business of banking in the Republic and incorporated by or under any written law of the Republic.

(2) Notwithstanding anything to the contrary contained in any written law in force at the commencement of this Act, an instrument purporting to create a power of attorney duly executed and authenticated in accordance with this section shall be deemed to be properly and validly executed and attested for all or any of the purposes for which a power of attorney may be used under any such written law.

[11] Section 3(2) of the PA Act provides that "no instrument purporting to create a power of attorney executed after the commencement of this Act shall have any validity to create such power within Peninsular Malaysia unless the instrument, if executed within Peninsular Malaysia, is executed before, and is authenticated in the appropriate form set out in the First Schedule, or if executed outside Peninsular Malaysia, the execution is authenticated, in such form as may be accepted by the Registrar". The First Schedule provides the following form of authentication of a power of attorney executed by an individual within Peninsular Malaysia, which form is a template for the form of authentication of a power of attorney executed by an individual outside Peninsular Malaysia:

(Section 3)

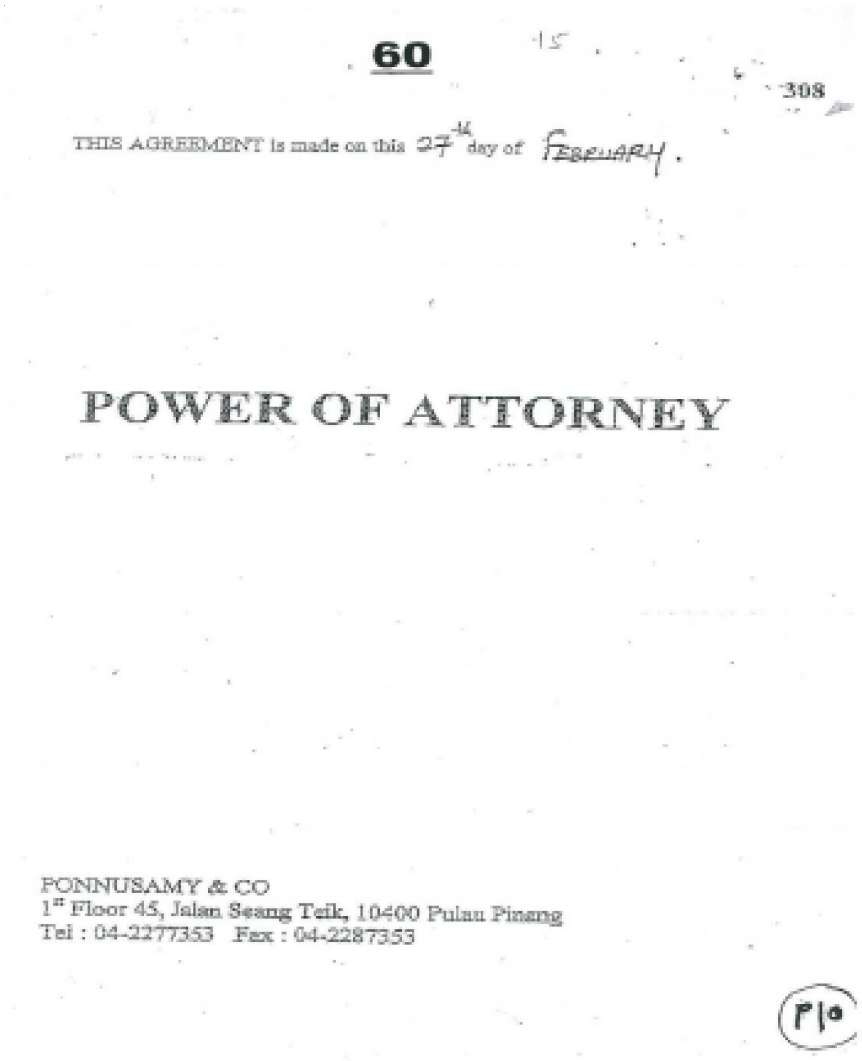
FORM I

FORM OF AUTHENTICATION IN CASE OF A POWER OF ATTORNEY EXECUTED BY AN INDIVIDUAL

I … (Magistrate, Justice of the Peace, Land Administrator, Notary Public, Commissioner for Oaths, Bank Official or Advocate and Solicitor of the High Court in Malaya) officiating [or practising] at …, hereby certify that the signature/thumb-mark of the donor above named was written/affixed in my presence on this … day of … 20…, and is, to my own personal knowledge, [or according to information given to me by trustworthy and respectable persons, namely … of … and … of …, which information I verily believe,] the true signature/thumb-mark of … who has acknowledged to me that he is/is not of full age and that he has voluntarily executed this instrument.

Witness my hand …

[12] But in the case of the impugned PA, the required form of authentication was not there. Pages 308 - 313 of the appeal record exhibited the impugned PA. The following page, 314AR, was the letter of M Raman & Associates dated 27 August 2009, an altogether different exhibit. Page 313AR must be the final page of the impugned PA. Then there could be no mistake about it. Pages 308 - 313AR made up the entirety of the impugned PA. And there could also be no mistake about it that there was no form or any sort of form of authentication of the impugned PA which consisted of the following:



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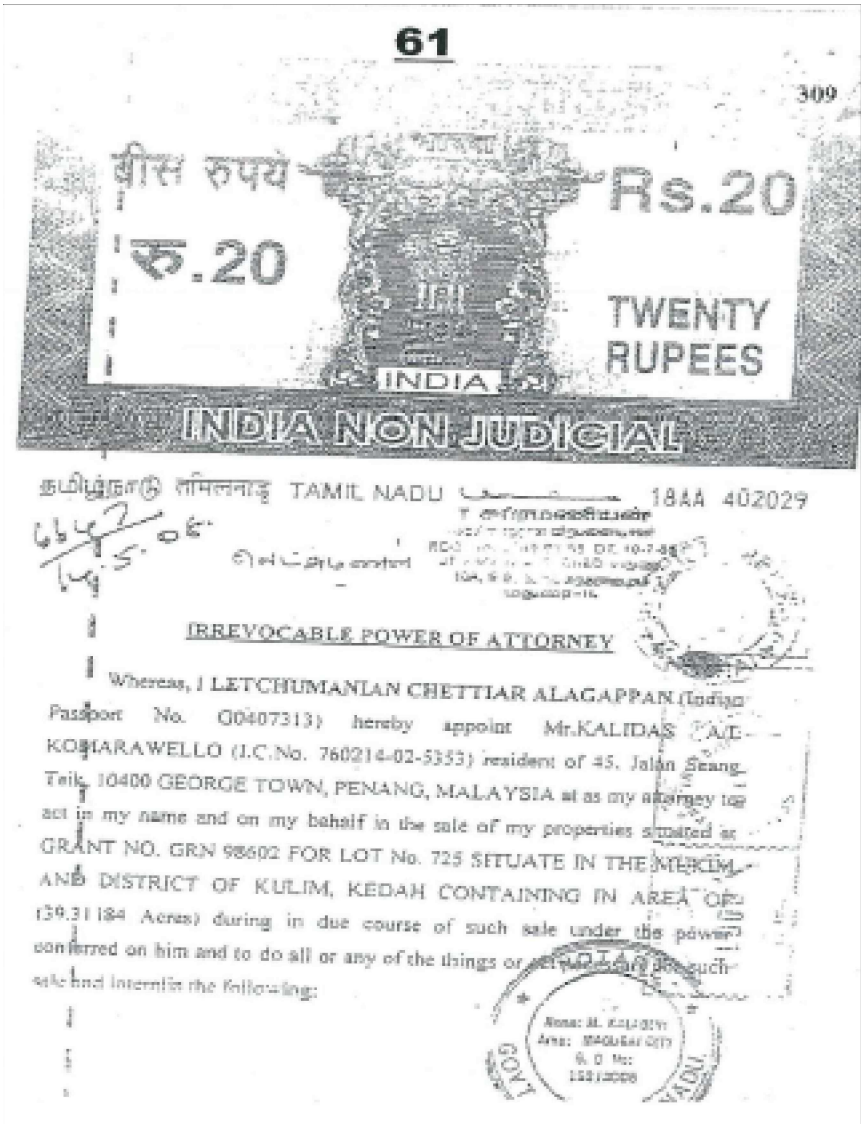
THIS AGREEMENT is made on this 27th day of FEBRUARY.

POWER OF ATTORNEY

PONNUSAMY & CO
1st Floor 45, Jalan Seang Teik, 10400 Pulau Pinang
Tel : 04-2277353 Fax : 04-2287353

P10



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बीस रुपये

Rs.20

रु.20

TWENTY RUPEES

INDIA

INDIA NON JUDICIAL

தமிழ்நாடு तमिलनाडु TAMIL NADU 18AA 402029

IRREVOCABLE POWER OF ATTORNEY

Whereas, I LETCHUMANLAN CHETTIAR ALAGAPPAN (India Passport No. G0407313) hereby appoint Mr.KALIDAS A/L KOMARAWELLO (I.C.No. 760214-02-5353) resident of 45, Jalan Seang Teik, 10400 GEORGE TOWN, PENANG, MALAYSIA as my attorney to act in my name and on my behalf in the sale of my properties situated at GRANT NO. GRN 98602 FOR LOT No. 725 SITUATE IN THE MUKIM AND DISTRICT OF KULIM, KEDAH CONTAINING IN AREA OF (39.3184 Acres) during in due course of such sale under the power conferred on him and to do all or any of the things or acts necessary for such sale and interalia the following:

A

B

C

D

E

F

G

H

I

A

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I hereby executed this irrevocable power of attorney in respect of said property. As a trustee of Estate of SONA LENA ALAMELOO ACHI 310

B NEE S.L ALAMELOO ACHI D/O PALANIAPPA CHETTIAR, first of all I submits that I seek the permission for alienate the said property in petition no : 32-05 of 1996 dt 03.06.1996 from the Malaysian high Court of alor

C setar for which I execute this irrevocable power of attorney as a executor cum trustee.

To sale the property either whole, or partly or divided in so many

D small lands and conduct negotiation for sale the property. Received the advance amount as well as sale amount and enter in to the sale agreement with appropriate person and execute sale deed before the Registration

E authority and received the sale completion document and sign the document of transfer of patta, endorsement etc., inrespect of the said property. To sign for me before central and state government official or before officials for getting plan approval in respect of property above mentioned.

F

To sign and to borrow any amount from any Bank (or) financial corporation inrespect of said property under mortgage.

G

And already Malaysian Government acquisition 2. 5278 acres on 23.11.2000 in consideration of the sum of Indian Rupees Ten thousand. In future the Malaysian Govt. once again do the said act, to appoint a pleader

H for appear before the settlement officer, and to file any suits or other civil

I

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-3-

purpose to sign and verify the pleadings. He shall be entitled to prosecute all actions and defendant all proceedings upto highest court or office, in the realm.

And I hereby agree to ratify and confirm all acts or deeds done by my said Attorney inrespect of the said properties.

Executor

NOTARY
M. KALADEVI, B.A., B.L.,
ADVOCATE/NOTARY PUBLIC
CHAMBER NO-63,
COURT BUILDINGS,
MADURAI 625 020.

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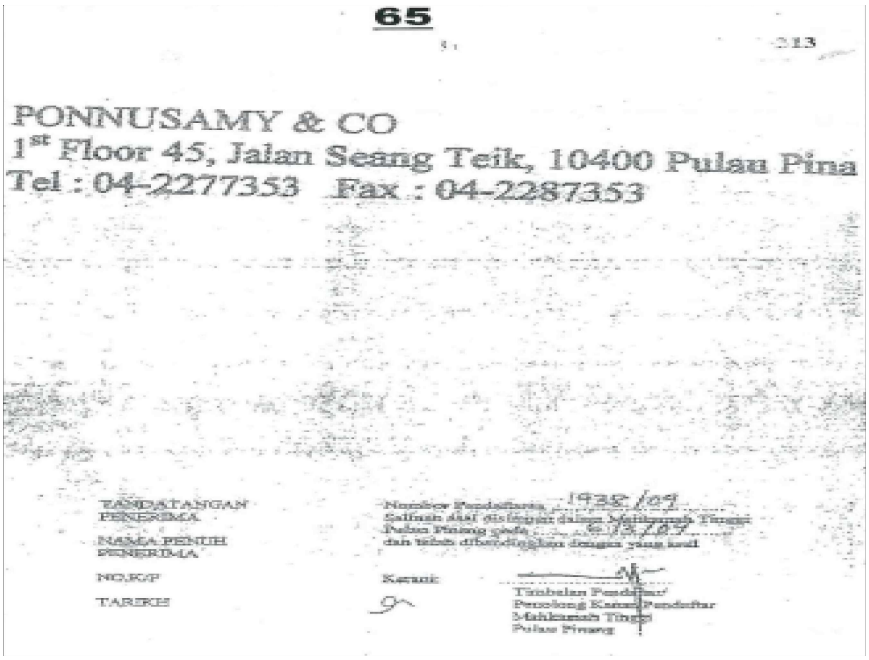
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PONNUSAMY & CO
1st Floor 45, Jalan Seang Teik, 10400 Pulau Pina
Tel : 04-2277353 Fax : 04-2287353

TANDATANGAN PENERIMA
NAMA PENUH PENERIMA
NO.K/P
TARIKH

Nombor Pendaftaran 1928/09
Salinan asal ini telah didaftarkan dalam Mahkamah Tinggi Pulau Pinang pada 6/12/09
dan telah dibandingkan dengan yang asal.

Kerani
Tandatan Pendaftar/
Penolong Kanan Pendaftar
Mahkamah Tinggi
Pulau Pinang

[13] Section 3(2) of the PA Act provides that in order to have validity, a power of attorney must have a form of authentication, which must be "meticulously complied with" (see *Lim Eng Chuan Sdn Bhd v. United Malayan Banking Corp & Anor* [2010] 9 CLJ 637; [2011] 486 at 505 per Low Hop Bing JCA). The want of a form of authentication "would render the instrument invalid" (*Lim Eng Chuan Sdn Bhd v. United Malayan Banking Corp & Anor (supra)* per Zaharah Ibrahim JCA as she then was). In the case of the impugned PA, there was no form of authentication. But that was ignored by the trial court who held at para. 42 of its judgment that non-compliance with s. 3 of the PA Act was not pleaded by the appellants. In the supposed absence of that pleading, the trial court held that s. 3 of the PA Act could be ignored. But with respect, the validity of the impugned PA was a pleaded issue. The claim was for specific performance of the SPA executed by Kalidas who was not the registered proprietor of the said land. The respondent pleaded that Kalidas was the lawful attorney of the first appellant (see paras. 3 and 9 of the amended statement of claim). The respondent asserted that the impugned PA was valid. But the impugned PA could not be valid if it had not complied with the PA Act. The trial court could not say that the impugned PA was valid in a vacuum, without reference to the PA Act. On the validity of the impugned PA, the provisions of the PA Act could not be ignored. Since the impugned PA lacked the required form of authentication, it had no validity, that is, even if the alleged signature of the first appellant on the impugned PA were genuine. That was the effect of s. 3 of the PA Act. Since the

impugned PA lacked the form of authentication and therefore had no validity, it could not be presumed, pursuant to s. 85 of the Evidence Act, that the impugned PA was so executed and authenticated. "The statute is the master and not the servant of the judgment" ('judges and lawyers' by Lord Devlin, *Modern Law Review* 1976, vol 39 at p. 13). But written law was ignored. Instead, the trial court relied on a non-applicable authority, *Melantrans Sdn Bhd v. Carah Enterprise Sdn Bhd & Anor* [2003] 2 CLJ 86 which had different facts and where the power of attorney was not in issue, and which had no bearing whatsoever, to hold that the impugned PA had complied with ss. 3 and 4 of the PA Act.

[14] The next para. (38) of the grounds of the trial court was equally bewildering:

> 38. Dalam kes di hadapan Mahkamah, walaupun Defendan Pertama telah bersungguh-sungguh untuk membuktikan penafiannya tetapi Defendan Pertama gagal untuk menafikan bahawa tandatangan di exhibit P10 bukan kepunyaannya. Tambahan pula peguam terpelajar yang bertindak bagi Defendan Pertama mengakui dalam hujahnya bahawa pemalsuan dan penipuan tidak diplid secara specifik dalam pliding. Adalah undang-undang yang mantap bahawa frod hendaklah diplid secara specific dan dibuktikan melampaui keraguan yang munasabah.

[15] It was bewildering that the trial court could say on the one hand that the core issue was whether the impugned PA was valid and or whether the impugned PA was a forgery (palsu) and on the other hand that fraud was not specifically pleaded. It was even more baffling that the trial court could say that the first appellant did not challenge his alleged signature on the impugned PA and or that fraud was not pleaded, when it was its own finding that the issue was whether the impugned PA was valid and or whether the impugned PA was a forgery. At paras. 19 - 27 of its judgment, the trial court summarised the evidence adduced by the respondent. At para. 28(2) of its judgment, the trial court remarked that whether the claim would be allowed or dismissed would depend on four findings, *to wit*, including a finding as to whether the impugned PA was valid (sah). At paras. 29 - 31 of its judgment, the trial court summarised the evidence of the appellants as follows:

> 29. Sebagai pelaksana wasiat terhadap estet pusaka SL Alameloo, Defendan Pertama menafikan bahawa beliau melantik Defendan Kedua sebagai pemegang kuasa dan jika **ada pelantikan itu adalah palsu** dan tidak sah di sisi undang-undang. Defendant Pertama mendakwa sebenarnya beliau telah melantik Defendan Keenam sebagai wakilnya pada 06.03.1996 melalui surat kuasa wakil No. 403/1996 yang didaftarkan di Mahkamah Alor Setar, Kedah (Exhibit D52). *Defendant Pertama menafikan bahawa beliau telah melantik Kalidas a/l Kumarawelo (Defendan Kedua) sebagai pemegang kuasanya dan tandatangan Defendan Pertama di Exhibit P10 adalah palsu. Defendan Pertama dan Defendan Keenam mendakwa bahawa tandatangan atau cap jari adalah palsu* dan beliau tidak pernah

A memberi persetujuan atau kebenaran kepada Defendan Kedua untuk membuat demikian. Jika tandatangan itu tidak sah di segi undang-undang. Atas alasan itu Defendan Pertama memohon supaya tuntutan Plaintiff terhadap Defendan Pertama dan Defendan Keenam ditolak dan memohon supaya tuntutan balas dibenarkan.

B 30. Defendan Pertama juga menyatakan bahawa beliau tidak pernah kemukakan ke pejabat Defendant Ketujuh untuk pendaftaran atau penyempurnaan turun milik akibat kematian atau pindah milik harta pusaka SL Alameloo (simati). Defendan Pertama memasukan kaveat lien pada 08.10.2003 dan tidak pernah menarik balik kaveat itu.

C 31. **Oleh kerana tandatangan dan cap jari Defendan Pertama adalah palsu** dan transaksi itu batal, Defendant Pertama dan Defendan Keenam membuat tuntutan balas supaya ... (removal of the caveat lodged by the Respondent)

(emphasis added)

D **[16]** That latter summary of the appellants' evidence narrated that the appellants categorically disputed the veracity of the impugned PA and alleged signatures. As such, when it held at para. 38 of its judgment that the first appellant did not challenge his alleged signature on the impugned PA, the trial court had lost track of its own summary of the evidence. Hitherto, at para. 29 of its judgment, the trial court appreciated that the evidence of E the appellants was that the impugned PA was a forgery, that the first appellant had not appointed Kalidas as his attorney, that the alleged signature of the first appellant on the impugned PA was a forgery, and that all other alleged signatures and thumbprints of the first appellant were also forgeries, the obvious effect of which evidence was that the alleged signature of the F first appellant on the impugned PA was not that of the first appellant. The first appellant categorically disputed his alleged signature on the impugned PA. At para. 31 of its judgment, the trial court also appreciated that the case of the appellants was that the alleged signature/s and thumbprint/s were forgeries. But in an about turn at para. 38 of its judgment, the trial court G contradictorily held that the first appellant did not challenge his alleged signature on the impugned PA - "defendan pertama gagal untuk menafikan bahawa tandatangan di exh. P10 bukan kepunyaannya".

[17] The accusation that fraud was not specifically pleaded was equally baffling. In relation to pleadings, O. 18 r. 8(1) of the Rules of Court 2012 H read together with r. 12(1)(a) require a specific plea of fraud as well as the particulars of fraud.

[18] What amounts to 'fraud'? "It is not easy to give a definition of what constitutes fraud in the extensive signification in which the term is I understood by civil courts of justice. The courts have always avoided hampering themselves by defining or laying down as a general proposition

what shall constitute fraud. Fraud is infinite in variety (*Reddaway v. Banham* [1896] AC 199, 221). The fertility of man's invention in devising new schemes of fraud is so great, that the courts have always declined to define it, or to define undue influence, which is one of the many varieties, reserving to themselves the liberty to deal with it under whatever form it may present itself (*Allcard v. Skinner* (1887) 36 Ch D 145, 183). Fraud, in the contemplation of a civil court of justice, may be said to include properly all acts, omissions, and concealments which involve a breach of a legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another (Story, Eq Jur 187). All surprise, trick, cunning, dissembling and other unfair way that is used to cheat anyone is considered fraud (Finch 439). Fraud in all cases implies a wilful act on the part of anyone, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to (*Green v. Nixon* (1857) 23 Beav 530, 535) "(*Kerr on Fraud and Mistake* 7th edn at p. 1). "The concept of fraud is notoriously difficult to define" (*Cavell and Anor v. Seaton Insurance Co* [2009] EWCA Civ 1363 per Longmore LJ, Mummery and Toulson LJJ in agreement). We would not hazard to define 'fraud'. We would just say that 'fraud' is a generic term which also covers all manner of cheat, deceit and dishonesty. Given its wide meaning, "an action in fraud will usually include a number of distinct causes of action ... " and "claims to trace assets in equity or, perhaps, at common law" (*Bullen & Leake & Jacobs Precedents of Pleadings* 18th edn, vol. 2 at 57-01).

[19] It should be noted that an action in fraud is not limited to the tort of deceit as used in *Derry v. Peek* (1889) 12 App Cas 377, ie, when it is shown that a false representation has been made knowingly or without belief in its truth or recklessly, careless whether it be true or false. Order 14 r. 1(2)(b) of the Rules of Court 2012 prevents an application for summary judgment being entered in "a claim by the plaintiff based on fraud". However, r. 1(2)(b) only prevents an application for summary judgment being entered in a claim based on fraud within the meaning as used in *Derry v. Peek*, because the term 'fraud' in r. 1(2)(b) of the Rules of Court 2012 was construed to take the meaning as used in *Derry v. Peek*.

[20] Deputy High Court Judge Lisa Wong in *Menfond Electronic Art & Computer Design Co Ltd v. Wong Tat Victor And Anor* [2013] HKCFI 7 imparted the following history for that anomaly:

> In *Barclays Bank Ltd v. Cole* [1967] 2 QB 738, the plaintiff bank claimed against the defendant who had robbed one of its branches for money had and received. The issue was whether the defendant was entitled to a trial by jury pursuant to s. 6(1) of the Administration of Justice (Miscellaneous Provisions) Act 1933, which depended on whether a charge of robbery was

a charge of fraud. It was held that fraud involved deceit and not violence, the charge of robbery did not make the action one in which a charge of fraud was in issue. Lord Denning said at 745:

> in law 'fraud' is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false: see *Derry v. Peek* (1889) 14 App Cas 337, 374, per Lord Herschell.

Lord Diplock also similarly said at 745:

> 'fraud' in civil actions at common law, whether as a cause of action or as a defence, has meant an intentional misrepresentation (or, in some cases, concealment) of fact made by one party with the intention of inducing another party to act upon it, which does induce the other party to act upon it to his detriment. A charge of robbery is clearly not embraced in 'a charge of fraud' in this sense.

The English Court of Appeal first decided that 'fraud' in O. 14 r. 1(2)(b) had the same meaning as that stated in *Barclays Bank Ltd v. Cole* in *E Hannibal & Co Ltd v. Frost* (unreported), 13 May 1987, referred to *Newton Chemical Ltd v. Arsenis* [1989] 1 WLR 1297 at 1300G-H, per Nicholls LJ.

By the time of the English Court of Appeal's decision in *Newton Chemical*, it was considered to be well established in England that 'an allegation of fraud' in O. 14 r. 1(2)(b) had the narrow meaning of a false representation in the technical sense of *Derry v. Peek* and did not embrace cases where other forms of dishonesty was alleged against a defendant. See Nicholls LJ at 1300C.

Newton Chemical further decided that r. 1(2)(b) could be invoked only where the plaintiff had chosen to put forward a claim founded on *Derry v. Peek fraud*. That case involved claims by the plaintiff manufacturers against their former commissioned sales representative (who had pleaded to false accounting) for, *inter alia*, repayment of commission on the ground that he had fabricated the orders on which he claimed and was paid commission. The statement of claim pleaded all the essential factual ingredients of fraud. Further, in proving that the defendant claimed commission on non-existent sales, the plaintiffs would prove that he was aware of the true position because he had fabricated the orders, that is, he submitted false claims. Nevertheless, the Court of Appeal, questioning whether r. 1(2)(b) ought to be preserved, held that the plaintiffs were not precluded by the rule from obtaining summary judgment against the defendant because they had expressly chosen to found their action on breach of contract and fiduciary duty and negligence and not on fraud or deceit. Moreover, to succeed with the claims as pleaded, the plaintiffs did not have to prove that the defendant had acted dishonestly. On the pleaded causes of action, it would be sufficient if the plaintiffs proved that, however the claims for commission came to be made, they were not supported by actual orders. See Nicholls LJ at 1300H-1303E; Stocker LJ at 1307B-D and O'Connor LJ at 1307G-H.

The narrow construction of r. 1(2)(b) adopted in the English authorities had, however, not been followed in Hong Kong.

[21] Lam VP in *Zimmer Sweden AB v. KPN Hong Kong Ltd And Anor* [2016] 2 HKC 282 imparted a comparable historical account. The Hong Kong Court of Appeal affirmed that courts in Hong Kong adopt a wide or liberal meaning to the word 'fraud' in r. 1(2)(b). Lam VP enlightened that the historical reason for the narrow meaning to the word 'fraud' in r. 1(2)(b) was because under the Administration of Justice (Miscellaneous Provisions) Act of 1933, an allegation of fraud entitled a party to a trial by jury, which entitlement to trial by jury would not permit a summary judgment:

> Unlike the Administration of Justice (Miscellaneous Provisions) Act of 1933 discussed above, in Hong Kong an allegation of fraud does not entitle a party to a trial by jury (see s. 33A of the High Court Ordinance (Cap 4A). Accordingly, there was no need to apply a narrow meaning for the sake of consistency with the provision for civil trials by jury.
>
> As will be seen later, the courts in Hong Kong have adopted a wide or liberal meaning of the 'fraud exception'. In other words, if the action included a claim based on an allegation of fraudulent conduct, the courts have held that O. 14 did not apply. This is consistent with Nicholls LJ's observation in *Newton* that 'as a matter of first impression, [the fraud] exception seems apt to embrace cases where dishonesty is alleged against a defendant', before he held that in England, the courts were bound by authorities to adopt a narrow meaning.

[22] The narrow meaning attributed to the word 'fraud' was also questioned in England. In *Newton Chemical Ltd v. Arsenis* [1989] 1 WLR 1297 at 1303, Lord Nicholls (Lord Stocker and Lord O'Connor in agreement) said that "a claim based on an allegation of *Derry v. Peek* fraud can, in a suitable case, be the subject of summary judgment" and that he did "not perceived what is the principle which justifies requiring a plaintiff today to prove at trial a claim based on *Derry v. Peek* fraud, alone of all forms of dishonesty". Lord Nicholls advised that r. 1(2)(b) be reconsidered by the Supreme Court Rule Committee. As it so happened, r. 1(2)(b) was abrogated in England on 1 June 1992, and deleted from the Singapore Procedure Code 2015 (see Singapore Civil Procedure Code 2015 at 14/1/2).

[23] In Malaysia, r. 1(2)(b) is still in the Rules of Court 2012, and courts still narrowly construe the term 'fraud' mentioned in r. 1(2)(b) as strictly defined in *Derry v. Peek* (see Malaysian Civil Procedure 2013 at para. 14/1/6). That could be seen in *Vincent Tan See Yin v. Noone & Company & Anor* [1995] 2 CLJ 195, where it was held that "since the statement of claim did not contain the ingredients for fraud as set out in *Derry v. Peek*, the claimant's claim did not fall within r. 1(2)(b)" (see Malaysian Civil Procedure 2013 at 14/1/6). Rule 1(2)(b) still prevents an application for summary judgment in

a claim based on fraud within the meaning as used in *Derry v. Peek*. However, a claim based on fraud not within the meaning as used in *Derry v. Peek* will not fall within r. 1(2)(b) (per *Tan See Yin Vincent v. Noone & Co*) and the entry of summary judgment is not prevented by that rule.

[24] The above discussion on r. 1(2)(b) is to clarify that 'fraud' in an action in fraud is not limited to the narrow technical meaning of the term 'fraud' in r. 1(2)(b).

[25] In an action in fraud, when fraud is pleaded, "bare allegations of fraud without particulars are to be disregarded by court" (see Malaysia Civil Procedure 2013 at 18/8/2). "With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud ... " (*Wallingford v. Mutual Society* (1880) 5 App Cas 685, 697 per Lord Selborne). "... it is a very proper rule that a general allegation of fraud is insufficient to infer liability ... the rule must require not only a general and vague allegation but also some actual fact or circumstance or circumstances which taken together imply, or at least very strongly suggest, that a fraud must have been committed, those facts assumed to be true" (*Wallingford v. Mutual Society* per Lord Watson). "... the mere averment of fraud, in general terms, is not sufficient ... without any definite character being given ... " (*Wallingford v. Mutual Society* per Lord Hatherley). "... you must give such an extent of definite facts pointing to the fraud as to satisfy the judge that those facts which make it reasonable that you should be allowed to raise the defence. And in like manner as to illegality, and every other defence that might be mentioned" (*Wallingford v. Mutual Society* per Lord Blackburn). An action in fraud must not just plead a simple statement that fraud is alleged but also the specific basis of the allegation, ie, the facts relied upon (see *Seaton v. Seddon* [2012] 1 WLR 3636 at para. 45). "... as a general rule, the more serious the allegation of misconduct, the greater is the need for particulars to be given which explains the basis for the allegation. This is especially so where the allegation that is being made is of bad faith or dishonesty. The point is well-established by authority in the case of fraud" (*Three Rivers District Council v. Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 at para. 51 per Lord Hope, Lords Steyn and Hutton in agreement). "The facts must be so stated as to show distinctly that fraud is charged (*Garden Neptune v. Occidental* [1989] 1 Lloyd's Rep 305, 308; *Davy v. Garrett* (1878) 7 Ch D 473 at 489)" (*Bullen & Leake & Jacobs supra* at 57-02).

[26] Order 18 r. 8(1) of the Rules of Court 2012 read together with r. 12(1)(a) require a specific plea of fraud as well as the particulars of fraud. Yet, it is not always necessary to plead the word 'fraud'. In *Davy v. Garrett* (1878) 7 Ch D 473 at 489), Thesiger LJ said:

> It may not be necessary in all cases to use the word 'fraud' - indeed in one of the most ordinary cases it is not necessary. An allegation that the defendant made to the plaintiff representations were untrue, and known to the defendant to be untrue, is sufficient. The word 'fraud' is not used, but two expressions are used pointing at the state of mind of the defendant - that he intended the representations to be acted upon, and that he knew them to be untrue. It appears to me that the plaintiff is bound to show distinctly that he means to allege fraud. In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence, they were innocent acts in themselves, and it is not to be presumed that they were done with a fraudulent intention.

[27] Lord Millet LJ, in *Armitage v. Nurse* [1998] Ch 241 clearly agreed with Thesiger LJ:

> The general principle is well known. Fraud must be distinctly alleged and as distinctly proved: *Davy v. Garrett* (1878) 7 Ch.D. 473, 489, per Thesiger L.J. It is not necessary to use the word "fraud" or "dishonesty" if the facts which make the conduct complained of fraudulent are pleaded; but, if the facts pleaded are consistent with innocence, then it is not open to the court to find fraud. As Buckley L.J. said in *Belmont Finance Corporation Ltd v. Williams Furniture Ltd.* [1979] Ch. 250, 268:
>
> > An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognised rule of practice. This does not import that the word 'fraud' or the word 'dishonesty' must be necessarily used … The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity.

[28] In *Three Rivers*, Lord Hope (Lords Steyn and Hutton in agreement) said:

> In my view this point alone is a sufficient answer to the criticism based on Thesiger LJ's remarks in *Davy v. Garrett*. The principle to which those remarks were directed is a rule of pleading. As the Earl of Halsbury LC said in *Bullivant v. A-G for Victoria* [1901] AC 196 at 202, [1900-3] All ER Rep 812 at 814, where it is intended that there be an allegation that a fraud has been committed, you must allege it and you must prove it. We are concerned at this stage with what must be alleged. A party is not entitled to a finding of fraud if the pleader does not allege fraud directly and the facts on which he relies are equivocal. So too with dishonesty. If there is no specific allegation of dishonesty, it is not open to the court to make a finding to that effect if the facts pleaded are consistent with

A conduct which is not dishonest such as negligence. As Millett LJ said in *Armitage v. Nurse* [1997] 2 All ER 705 at 715, [1998] Ch 241 at 256, it is not necessary to use the word 'fraud' or 'dishonesty' if the facts which make the conduct fraudulent are pleaded. But this will not do if language used is equivocal (see *Belmont Finance Corp Ltd v. Williams Furniture Ltd* [1979] 1 All ER 118 at 131, [1979] Ch 250 at 268 per Buckley LJ). In that B case it was unclear from the pleadings whether dishonesty was being alleged. As the facts referred to might have inferred dishonesty but were consistent with innocence, it was not to be presumed that the defendant had been dishonest. Of course, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable C of supporting the allegation, the allegation itself may be struck out. But it is not a proper ground for striking out the allegation that the particulars may be found, after trial, to amount not to fraud, dishonesty or bad faith but to negligence.

D **[29]** The English reports are replete with decisions that applied *Davy v. Garrett* and or *Armitage v. Nurse*. It is therefore not the law in England that it is always necessary to plead the word 'fraud'. That is also so in Australia (*Mijatovic v. Legal Practitioners Complaints Committee* - (2008) WASCA 115; *Banque Commerciale SA (in liquidation) v. Akhil Holdings Ltd* [1990] LRC (Comm) 702); *Meridian Oil NL v. Smyth & Ors* [1999] WASC 173; *Duke Group* E *Ltd (in liq) v. Pilmer and Ors* (1998) 27 ACSR 1; *UTSA Pty Ltd (in Liq) v. Ultra Tune Australia Pty Ltd* [2004] VSC 105), *Canada (Harper v. Cameron* [1893] BCJ No. 41; *Savage v. Greco Donair Franchise Ltd and Greco Donair Food Ltd* [1981] NBJ No. 69), *Hong Kong (Tam Chi Kok Gabriel v. Fok Eugina* [2003] HKCU 657; *Haifa International Finance Co Ltd v. Concord Strategic Investments* F *Ltd* [2009] HKCU 415; *Higashigi Industrial Company Limited v. Leung Luen Kai & Anor* [2012] HKCU 956; *Liang Jun Xian v. Tsui Hin Chi* [2011] HKCU 179; *Leung Man Keung v. Ever Wealthy Resources Ltd* [2004] HKCU 215), and *New Zealand (Schmidt and Bellshaw v. Greenwood* (1912) 32 NZLR 241). Given its wide acceptance, it is therefore surprising that neither *Davy v. Garrett* nor G *Armitage v. Nurse* was ever applied in Malaysia to resolve whether it is necessary to plead the word 'fraud', until *Ranjeet Singh Sidhu & Anor v. Zavarco PLC & Anor* [2016] 2 CLJ 975; [2015] MLJU 638, where Wong Kian Kheong JC first cited *Armitage v. Nurse* and said:

> I do, however, draw attention to two separate aspects of the requirements H relating to the pleading of fraud. The first is that there must be an express allegation of fraud. The words fraud or dishonesty do not have to be used. The use of words which are inconsistent with the absence of fraud and dishonesty is enough. It is enough, therefore, to plead that the Defendant was party to an unlawful means of conspiracy since such involvement is wholly inconsistent with an absence of fraud or I dishonesty. It is in this sense I consider that the authorities tell us that there is no proper pleading of fraud if the pleaded facts are consistent with the absence of fraud or dishonesty.

[30] The time has surely come to make a stand. We entirely agree with the reasoning in *Davy v. Garrett*, *Armitage v. Nurse*, and *Three Rivers* that it is not always necessary to plead the word 'fraud' if the facts which make the conduct fraudulent are pleaded.

[31] In their statement of defence, the appellants pleaded, *inter alia*, that the impugned PA was a forgery (pemalsuan - see 70AR), that the first appellant had not appointed Kalidas as his attorney (see 71AR & 75AR), that all documents to effectuate the transfer of the subject were forgeries (see 72AR), that his alleged signatures or thumbprints were forgeries (see 73AR), that the purchase of the said land by the respondent was based on forged instruments (see 76AR). The word 'fraud' was not pleaded. But given that 'forgery' was pleaded, could it therefore be said that 'fraud' was not pleaded at all? 'Fraud' and 'forgery' are not the same. Those two words could not be equated nor interchanged, as 'fraud' is not confined to deception by 'forgery'. 'Forgery' is a specific method of fraud. But 'forgery' is nonetheless 'fraud' in every sense of the word. The word 'fraud' in the generic sense was not pleaded. But 'fraud' in the specific sense of 'forgery' was pleaded. Given that the specific fraud was pleaded, whether the word 'fraud' was specifically pleaded was a semantic detail of no significance whatsoever from the standpoint of pleadings, as the correct test for a valid plea of fraud is whether or not the facts which make the conduct fraudulent are pleaded (see *JSC Bank of Moscow v. Kekhman & Ors* [2015] EWHC 3073 (Comm) at para. 20; see also *Garden Neptune v. Occidental* [1989] 1 Lloyd's Rep 305 at 308). Forgery was alleged and the respondent could not have been taken by surprise (see *Tay Tho Bok & Anor v. Segar Oil Palm Estate Sdn Bhd* [1996] 1 LNS 60; [1996] 3 MLJ 181, where Mohamed Ghazali J, as he then was, stated "I would agree that there is no mention of the word 'fraud' in the said para. 6 of the statement of claim, but then, what is fraud? Basically, fraud is dishonesty ... It is my view that although the word 'fraud' does not appear in the said para. 6 of the statement of claim, I would tend to agree ... that that paragraph contains an averment of dishonesty and particulars of the dishonest acts ... and I do not for once think that the defendant was taken by surprise". Given that the specific fraud, namely forgery, was pleaded, there was no basis to say that fraud was not pleaded.

[32] The pleaded defence was 'forgery'. But the trial court was adamant that forgery and fraud were not specifically pleaded (see para. 38 of the judgment of the trial court). Worse still, when the issue was whether the impugned PA was valid and or fake/genuine, the trial court held that s. 17 of the Contracts Act 1950 applied and that based on that provision the allegation of fraud was baseless and not proved - "Oleh yang demikian, mahkamah membuat kesimpulan bahawa dakwaan frod oleh defendan pertama tidak berasas dan tidak dibuktikan". With respect, s. 17 of the

Contracts Act concerns acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract. But the instant case was not about a party being deceived to enter into a contract. Insofar as the first appellant was concerned, the defence was that the impugned PA was a forgery. And insofar as the respondent was concerned, the claim was that Kalidas was the lawful attorney. It was never the case that the respondent was induced by the first appellant to enter into the SPA. Section 17 of the Contracts Act had no application whatsoever. The trial court was wrong to hold that the defence of the first appellant was baseless and not proved on the basis of an inapplicable provision of law.

[33] And worst of all, the trial court held (see para. 41 of the judgment of the trial court) that "fraud/palsu", meaning fraud/forgery, was not proved beyond reasonable doubt, which was, at the material time of the decision below, the wrong standard of proof for forgery. At the material time of the decision below, the standard of proof for fraud in civil proceedings was beyond reasonable doubt (see *Yong Tim v. Hoo Kok Chong* [2005] 3 CLJ 229, where the court affirmed that fraud in a civil proceeding must be established beyond reasonable doubt, following the decision of the Privy Council in *Saminathan v. Pappa* [1980] 1 LNS 174; [1981] 1 MLJ 121), with the result that there was more than one civil standard of proof, one for fraud and another for other actionable wrongs. But that incongruity, a criminal standard in a civil proceeding, was effaced in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584; [2015] 5 MLJ 1, at paras. 52 and 53, where it was held, per Richard Malanjum CJ (Sabah and Sarawak), delivering the judgment of the court, "that in a civil claim even when fraud is alleged the civil standard of proof, that is, on the balance of probabilities, should apply ... in the absence of a statutory provision to the contrary, proof in civil proceedings of facts amounting to the commission of a crime need only be on a balance of probabilities ... (and that) *Yong Tim v. Hoo Kok Cheong* ... is no longer the law ... ". The standard of proof for fraud in a civil proceeding is clearly now on a balance of probabilities.

[34] But the standard of proof for forgery in a civil proceeding had been on a balance of probabilities, even before *Sinnaiyah*. In *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31; [1993] 1 MLJ 182, the court per Anuar J, as he then was, delivering the judgment of the court, rejected the argument that the standard of proof for forgery should be beyond a reasonable doubt:

> It was argued for the appellant both in the court below and before us that the standard of proof required in cases such as this should be beyond a reasonable doubt and *Syarikat Perkapalan Timor v. United Malayan Banking Corp Bhd* was cited in support. We have examined this decision with some

care but we are unable to agree with the appellant's counsel that it is authority for the proposition that is put forward for the appellant. In our judgment, a customer who alleges that his banker honoured forged cheques drawn on his account need only establish the charge of forgery on a balance of probabilities and in this respect, we agree with the statement of the law by Gunn Chit Tuan J (as he then was) in *Syarikat Islamiyah v. Bank Bumiputra Malaysia Bhd* where at p. 220 the learned judge said:

> In this case although it would appear that there was no or insufficient evidence to prove beyond reasonable doubt for purposes of criminal proceedings that the signatures on the cheques concerned were forged by the said Awang alias Che Mah bin Che Lob, yet I was satisfied that there was evidence adduced to prove on a balance of probabilities in this case that the signatures on the cheques were not those of the plaintiff's but were forged or placed thereon without the plaintiff's authority and were therefore wholly inoperative.

[35] That the standard of proof for forgery is on a balance of probabilities had been repeatedly upheld by the apex court (*Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133; [2001] 1 MLJ 241, *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229) and by the Court of Appeal (*Lim Tai Ming & Sons Credit Sdn Bhd v. Lim Tuck Thien* [2001] 1 CLJ 316; [2001] 1 MLJ 57, *Great Eastern Life Assurance (Malaysia) Bhd v. Siu Yan Tam & Anor And Another Appeal* [2014] 4 CLJ 666; [2014] 5 MLJ 854, *Bank Pertanian Malaysia Bhd v. Nora'rifah Darus* [2014] 7 CLJ 631; [2014] 6 MLJ 870, *Nik Abd Rahim Abdul Jalil lwn. Suhaili Abdul Halim & Yang Lain* [2014] 1 LNS 133; [2014] 5 MLJ 114, *Mohd Salim Said & Ors v. Tang Pheng Kee & Anor And Another Appeal* [2014] 6 CLJ 485; [2014] 3 MLJ 504, *Bumiputra-Commerce Bank Bhd v. Augusto Pompeo Romei & Anor* [2014] 6 CLJ 17; [2014] 3 MLJ 672). As said, the wrong standard of proof for forgery in a civil proceeding was applied.

[36] In the same para. 41, the trial court asked whether there was evidence that the appointment of Kalidas was a forgery - "Persoalannya apakah bukti bahawa pelantikan defendan kedua adalah palsu" and answered that there was none but for the oral evidence of the first appellant which was not supported by other evidence. The trial court held that the evidence supported that the respondent was a *bona fide* purchaser for value, and that the first appellant handed the impugned PA to Kalidas. Premised on those broad reasons, the trial court went on to hold that it was proved on the balance of probabilities that the respondent was entitled to rely on the impugned PA which it held was valid, that the respondent acted reasonably and was not rash in the purchase of the said land, that the respondent was entitled to a transfer of the said land, that the third and fourth defendants had breached their solicitors' undertaking to refund, and that the Registrar of Titles could not suspend registration of the said transfer for more than 14 days.

[37] Specific performance was ordered against the appellants. The counter-claim for damages occasioned by entry of the respondent's caveat was dismissed, while the caveat entered by the second appellant was removed.

[38] The appellants appealed, only against the respondent, but found no success at the Court of Appeal who agreed that the respondent was a *bona fide* purchaser, and held that once it was proved that the respondent was a *bona fide* purchaser the burden was upon the appellants to prove the defence. The Court of Appeal further agreed that the oral evidence of the first appellant could not be given much probative value in the light of other contemporaneous documents, and said that the first appellant was a witness with a motive and whose "oral evidence must therefore be viewed with circumspection". But to be even-keeled, the Court of Appeal should have said that Kalidas was also a witness with probable motive to defend the impugned PA and whose evidence should also be viewed with circumspection.

[39] The Court of Appeal gave full marks to the trial court for its evaluation of the evidence. In relation to the evaluation of the evidence by the trial court, the second ground raised by learned counsel for the appellants at the Court of Appeal to reverse the outcome was that the trial court did not fully appreciate/evaluate the circumstantial evidence, which were the attempts by Kalidas to purchase the said land and the second sale and purchase agreement where Kalidas purportedly purchased the said land from the first appellant, which pointed, it was argued, to forgery. The Court of Appeal held that the said circumstantial evidence had no probative value against the respondent:

> 73. ... we fully agree with learned counsel for the Plaintiff that these evidence, even if accepted by the Court, had not much of probative value against the Plaintiff's case. While the evidence of the first three occasions might show attempts made by D2 to purchase the said Land, but to say they had proven that there was a "fraudulent design" by D2 as part of a scheme to defraud/cheat D1 is not very convincing and in fact would amount to conjecture, suspicion and speculation. The only circumstantial evidence worth considering is the 2nd SPA. However that evidence if at all goes towards the credibility of D2 but it is not a matter which concerns the Plaintiff and cannot affect the Plaintiff's position as a *bona fide* purchaser for value. This is because as stated earlier, D1's pleaded case against the Plaintiff was not premised on fraud but forgery and negligence and secondly, all the (alleged) fraudulent acts were directed at D2 to which the Plaintiff was neither a party nor privy.
>
> 74. **Hence, even if fraud was proved against D2, it would not defeat the title of the Plaintiff as a *bona fide* purchaser for value of the said land under section 340(2) of the NLC**. (Note: the Plaintiff has since been registered as the proprietor of the said land pursuant to the High Court order). (emphasis added)

[40] In effect, the Court of Appeal held at para. 74 of its judgment that a *bona fide* purchaser acquires an immediate indefeasible title, *albeit* that the instrument of transfer is executed by a fraudster and or that the instrument of transfer is a forgery. With all due respect, the Court of Appeal could not be more mistaken. The judgment of the Court of Appeal was dated 11 January 2016. But by then, there had been a diametric change in the law. On 11 January 2016, the law was no longer as enunciated in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133; [2001] 1 MLJ 241, where it was held that the proviso in s. 340 of the National Land Code applied to the whole of s. 340, and that a *bona fide* purchaser acquires an immediate indefeasible title upon registration, *albeit* that the registration of title is obtained by forgery or by means of an insufficient or void instrument. In *Adorna Properties*, the court held that the proviso in s. 340 applies not just to sub-s. (3) and upheld the title of the *bona fide* purchaser in spite of the fact that the instrument of transfer, which was executed by an imposter, was a forgery. That decision could not have gone down well with landowners, who if cheated of their lands through forged instruments would by reason of *Adorna Properties* be without redress to recover their lands, except for what could only be a meaningless action *in personam* against the fraudster if found. "This brought about serious concerns amongst landowners who became vulnerable ... even through instruments of transfers which are forged" (*Low Huat Cheng & Anor v. Rozdenil Toni & Another Appeal* [2017] 3 CLJ 257; [2016] 5 MLJ 141 per Azahar Mohamed FCJ, commenting on *Adorna Properties* when in delivering the judgment of the court). As it was then, the law did not protect the title of a registered proprietor from fraud or forgery. But *Adorna Properties* no longer ruled the roost in January 2016. *Adorna Properties* was held as wrongly decided and expressly overruled in *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269, where it was held, per Arifin Zakaria CJ (Malaya), as he then was, that the proviso in s. 340 applies only to sub-s. (3) and not to the whole of s. 340.

[41] In his supporting judgment, Zaki Tun Azmi CJ thus illustrated the concept of deferred indefeasibility:

> I would like to look at s. 340 of the NLC in a more simplified manner.
>
> Let us refer to the first owner of a piece of land as 'A' who then transfers the same piece of land to 'B' and which subsequently is transferred to 'C'.
>
> As far as s. 340(1) of the NLC is concerned, A's title to the land is totally indefeasible. In short if A's name appears on the registration, no one can come and claim for that title. The law will not entertain it at all.
>
> Now comes the next person, B, whose name appears in the register. If it can be shown that the title or interests obtained by B was obtained by fraud or misrepresentation by him or anyone else to which he was a party

A or privy then his claim to the title or interest can be defeated (see s. 340(2)(a) of the NLC). Otherwise, B stands in the same position as A.

The situation where it is proved that the registration in B's name was obtained by forgery or by means of an insufficient or void instrument is
B the same (see s. 340(2)(b) of the NLC). His title or interest to the land is liable to be set aside by the previous owner who has a good title. In this latter instance, there is no need to show that B was a party or privy to that forgery or to obtaining the title or interest by a void instrument.

The third instance where B's title or interest could be defeated is where it was unlawfully acquired through the exercise of any power or authority
C conferred by any law. Section 340(2)(c) of the NLC deals with one who was for example acting in his capacity as an agent to a power of attorney. Even if C is in the same position as B, sub-s (3) also does not give protection to C unless he can show that he had acquired the title or interest in good faith and for valuable consideration. Any title or interest
D gained by any person thereafter is also liable to be set aside unless it could be shown that he had acquired it in good faith and for valuable consideration. This is what is called deferred indefeasibility of title. If his title or interest is challenged on similar grounds, the burden of proving there was valuable consideration and good faith lies on him.

E **[42]** *Tan Ying Hong* was first followed in *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768, where the court enunciated as follows:

Clearly therefore, with the decision in *Tan Ying Hong*, our Torrens system subscribes once again to the theory of deferred indefeasibility, after a stormy fling with *Frazer v. Walker*.
F

Tan Sook Yee's Principles of Singapore Law (3rd Ed) at p. 285 thus illustrated the difference between immediate and deferred indefeasibility:

> In the early days of Torrens jurisprudence, there was some uncertainty as to whether a registered proprietor obtained an
G immediate indefeasible title or merely a deferred indefeasible title. An immediate indefeasible title means that the registered proprietor's title becomes indefeasible once his title is registered, notwithstanding that the source of the new registered proprietor's title might be the result of forgery. A deferred indefeasible title, on the other hand, defers the shield of indefeasibility until the next
H purchaser. An illustration of the difference between both theories is as follows: X is the original owner. Y forges X's signature and sells the property to Z, who was not privy to the forgery. Z registers the transfer and becomes the new registered proprietor. If indefeasibility were conferred immediately, Z's rights over the land will prevail over X's, notwithstanding that Z's title was derived
I from forged documents. In contrast, under the theory of deferred

> indefeasibility, Z's rights will not prevail as against X. However, should Z then sell the land to A, A will be able to claim indefeasibility as against X. Indefeasibility of title is thus conferred to the next purchaser.

In the instant case, both the trial court and the Court of Appeal held that the fifth and sixth respondents were *bona fide* purchasers. But unfortunately, both the trial court and the Court of Appeal failed to inquire whether the fifth and or sixth respondents were immediate or subsequent purchasers. Only a subsequent purchaser is entitled to raise the shield of indefeasibility. An immediate purchaser of a title tainted by any one of the vitiating elements acquires a title that is not indefeasible. It flows from *Tan Ying Hong* that the *bona fides* of an immediate purchaser is not a shield to defeasibility. The defeasible title of a *bona fide* immediate purchaser is still liable to be set aside. The defeasible title of a *bona fide* immediate purchaser only becomes indefeasible when it is subsequently passed to a *bona fide* subsequent purchaser. That the fifth and sixth respondents were *bona fide* purchasers could not by that fact alone give a shield of indefeasibility. The fifth and or sixth respondents only acquired an indefeasible title if they were *bona fide* subsequent purchasers. But for the fifth and sixth respondents to have been *bona fide* subsequent purchasers, there must have been an immediate purchaser in the first place. The first to fourth respondents, from whom the fifth and sixth respondents obtained title, were not immediate purchasers. Rather, they were imposters of those entitled to the estate of the deceased. They, like the fake Boonsom who impersonated the true Boonsom, had no title to pass to the fifth and sixth respondents. The fifth and sixth respondents who were the immediate purchasers, acquired a title that was not indefeasible. But when the fraudulent title of the first to fourth respondents were set aside by the default judgment, the defeasible title of the fifth and sixth respondents was also defeated.

[43] *Tan Ying Hong* was next followed in *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] 6 MLJ 1, where it was held by Ramly Ali FCJ, who in delivering the judgment of the court also referred to *Kamarulzaman Omar & Ors v. Yakub Husin & Ors*, that "once the court is satisfied that the transfer of the title to the appellant arose from a void instrument, to borrow the words of Arifin Zakaria CJ (Malaya) in *Tan Ying Hong*, 'it automatically follows that they are liable to be set aside'".

[44] In a most recent decision of the court, namely *Low Huat Cheng & Anor v. Rozdenil*, Azahar Mohamed FCJ, delivering the judgment of the court, thus summarised the law as set out in *Tan Ying Hong* and then as applied in *Kamarulzaman Omar & Ors v. Yakub Husin & Ors*, and *Samuel Naik Siang Ting v. Public Bank Bhd*:

> On the basis of the law as we apply today, as set out by this court in *Tan Ying Hong v. Tan Sian San & Ors*, which was subsequently followed by *Kamarulzaman bin Omar & Ors v. Yakub bin Husin & Ors* and the recent

decision of this court in *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 6 MLJ 1, the third and fourth defendants were immediate purchasers. As immediate purchasers of a title tainted by a forged power of attorney, they acquired a title that was not indefeasible. That the third and fourth defendants were *bona fide* purchasers could not by that fact alone give a shield of indefeasibility. The defeasible title of the third and fourth defendants was still liable to be set aside before the fifth defendant, the subsequent purchaser became the holder of the registered title of the property on 11 August 2010. However, by the time the plaintiff as the true original registered proprietor commenced the present action on 9 August 2012, the defeasible title of the third and fourth defendants as *bona fide* immediate purchasers had become indefeasible when it was subsequently passed to the fifth defendant, a *bona fide* subsequent purchaser. It therefore follows that the High Court and the Court of Appeal had gone too far to declare that the transfer of the property from the original owners (that is to say the parents of the plaintiff) to the third and fourth defendants was void. Unlike in the case of *Tan Ying Hong v. Tan Sian San & Ors*, the issue of setting aside the third and fourth defendants' title to the said property did not arise as the property had been sold to the fifth defendant, who was *bona fide* purchaser without notice; a retransfer of the property to the plaintiff's name was therefore not possible in the circumstances. The plaintiff's right of recovery of the property, to borrow the words of David SY Wong, 'is gone beyond recall'.

[45] In the wake of *Tan Ying Hong, Kamarulzaman bin Omar & Ors v. Yakub bin Husin & Ors*, and *Samuel Naik Siang Ting v. Public Bank Bhd*, the concept of immediate indefeasibility of the title of an immediate purchaser was passé, if not already in 2010 then certainly in January 2016. Only a subsequent purchaser is entitled to raise the shield of indefeasibility. The respondent was not a subsequent *bona fide* purchaser. The respondent was an immediate purchaser who was not entitled to the protection under the proviso in s. 340. "An immediate purchaser of a title tainted by any one of the vitiating elements acquires a title that is not indefeasible. It flows from *Tan Ying Hong* that the *bona fides* of an immediate purchaser is not a shield to defeasibility. The defeasible title of an immediate purchaser is still liable to be set aside" (*Kamarulzaman Omar & Ors v. Yakub Husin & Ors*).

[46] The Court of Appeal could not be more wrong in holding that the *bona fides* of the respondent, who was an immediate purchaser, was a shield against fraud committed against the first appellant. The title of the respondent could be defeated by any of the vitiating elements. On the facts, the title of the respondent could be defeated "where registration was obtained by forgery or by means of an insufficient or void instrument (see s. 340(2)(b) of the NLC and *Tan Ying Hong* at para. 8) or "where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law" (see s. 340(2)(c) of the NLC and *Tan Ying Hong* at para. 9).

[47] The Court of Appeal was also wrong to hold that once proved that the respondent was a *bona fide* purchaser, the burden was upon the appellants to prove forgery – "once the plaintiff had proven its pleaded case that it was a *bona fide* purchaser for valuable consideration, the burden (was) shifted to D1 to prove his defence but he failed to do so" (see para. 71 of the judgment of the Court of Appeal). As said, *bona fide* purchaser was no shield against defeasibility. The claim was for specific performance of the SPA executed by the supposed attorney of the first appellant. The respondent had to prove that the SPA was indeed executed by the lawful attorney of the first appellant. Proof of *bona fide* purchaser could not make out a *prima facie* case to shift the onus of proof to the appellants. We should elaborate on "burden of proof" and "onus of proof".

[48] The expressions "burden of proof" and "onus of proof" had been used interchangeably (see *Abrath v. North Eastern Rly* (1883) 11 QB D 440, *The Kite* [1933] All ER Rep 234, *Imperial Smelting Corporation Ltd v. Joseph Constantine Steamship Line Ltd; The Kingswood* [1940] 2 All ER 46, *The Commissioners for Customs & Excise v. National Westminster Bank Plc* [2003] EWHC 1822 (Ch), I*nterflora Inc and Another v. Marks and Spencer Plc* [2014] EWCA Civ 1403).

[49] The expression "onus of proof" does not appear in the Evidence Act. Only the expression "burden of proof" appears in ss. 101-103 of the Evidence Act. But there is a difference between the sense of the expression "burden of proof" in s. 101 and the sense of that same expression in s. 102.

[50] In *International Times & Ors v. Leong Ho Yuen* [1980] 1 LNS 31; [1980] 2 MLJ 86, Salleh Abas FCJ (as he then was), delivering the judgment of the court, said that the first sense of the expression "burden of proof" in s. 101 is the burden to establish the case which rests throughout on the party who asserts the affirmative of the issue, while the second sense of the expression "burden of proof" in s. 102 is the burden to adduce evidence:

> For the purpose of this appeal it is necessary to bear in mind the distinction between the two senses in which the expressions burden of proof and onus of proof are used (*Nanji & Co v. Jatashankar Dossa & Ors* AIR 1961 SC 1474-1478 and *Raghavamma v. Chenchamma* AIR 1964 SC 136-143). The first sense, signified by the expression burden of proof such as referred to in s. 101 of the Evidence Act is the burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue. The appellants in the present appeal relied on justification and fair comment. Therefore, the burden of proving these defences rests entirely upon them (*Gatley on Libel and Slander* 7th Ed, paras 351 and 354). The second sense referred to as onus of proof, on the other hand, relates to the responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other

A according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to ss. 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail. It is this onus that we are concerned with in the present B appeal.

[51] There is an essential distinction between burden of proof and onus of proof, burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts (*Addagada Raghavamma & Anor v. Addagada Chenchamma & Anor* 1964 SCR (2) 933).

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[52] The "burden of proof" in s. 101 is the burden to establish a case which rests throughout on the party who asserts the affirmative of the issue. The "burden of proof" in s. 102 is the burden to adduce evidence, to make out or rebut the claim. The "burden of proof" in s. 102 shifts from one side to D the other according to the weight of the evidence. To differentiate the sense used, the "burden of proof" in s. 101 is "burden of proof", while the "burden of proof" in ss. 102 and 103 is dubbed "onus of proof". In some jurisdictions, the s. 101 "burden of proof" is labelled "legal burden" while the s. 102 burden of proof" is referred to as "evidential burden".

E **[53]** In *Ranchhodbhai v. Babuhai* AIR 1982 Guj 308, P Desai and S Majmudar thus illustrated the "burden of proof" to establish the case which never shifts and the shifting burden to adduce evidence in the context of ss. 101 and 102 of the Indian Evidence Act which are identical to ss. 101 and 102 of the Evidence Act:

F It is also well to bear in mind that there is an essential distinction between "burden of proof" and "onus of proof"; burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence (see *Raghavamma v. Chenchamma*, AIR 1964 SC 136). Burden of proof has two distinct meanings, namely, (i) the burden of proof as a G matter of law and pleadings, and (ii) the burden of proof as a matter of adducing evidence. Section 101 of the Evidence Act deals with the former and s. 102 of the Evidence Act with the latter. The first remains constant but the second shifts. In a claim application, therefore, the burden of proof, in the first sense, certainly lies on the claimant. If he examines himself and his witness, if any, and if the evidence, tested in the light of H the principles set out above, is found to be acceptable, the onus shifts on the tortfeasor to prove those circumstances, if any, which dislodge the assertions of the claimants. If the tortfeasor fails to prove before the court any fact or circumstance which tends to affect the evidence led by the claimant, the claimant would be entitled to ask the court to hold that he has established the case and, on that basis, to make a just award it would I thus appear, that though the legal burden, - the burden as a matter of law

and pleadings - remains constant on the claimant, the burden as a matter of adducing evidence changes often times as the trial of the claim petition progresses.

[54] Section 101(1) provides that "Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist". "Section 101 states that the initial burden of proving a *prima facie* case in his favour is cast on the plaintiff ..." (*Woodroffe and Amir Ali Law of Evidence* 19th edn, vol. 3 at p. 3194). Illustration (b) to s. 101 puts it beyond doubt that the "burden of proof" rests throughout on the plaintiff. Section 102 provides that "the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side". "The initial onus of proving the case is always on the plaintiff" (*Sarkar Law of Evidence* 16th edn at 1593). Illustration (a) to s. 102 puts it beyond doubt that a plaintiff has the initial onus of proof.

[55] But "when (the plaintiff) gives such evidence as will support a *prima facie* case, the onus shifts on to the defendant, to adduce rebutting evidence to meet the case made out by the plaintiff. As the case continues to develop, the onus may shift back again to the plaintiff. It is not easy to decide at what particular stage, in the course of the evidence, the onus shifts from one side to the other. When after the entire evidence has been adduced, the tribunal feels it cannot make up its mind as to which of the versions is true, it will hold that the party on whom the burden lies has not discharged the burden, but if it has, on the evidence, no difficulty arriving at a definite conclusion, then the burden of proof on the pleading recedes into the background" (*Woodroffe and Amir Ali*, *supra*, at p. 3194; see also *Abrath v. North Eastern Rly* at 452). " ... the onus of proof may shift ... but the question must ultimately arise whether the person who is bound to prove the affirmative of the issue ... has discharged ... that burden" (*Jane Wakelin v. The London And South Western Railway Company* (1986) 12 App Cas 41; (1887) 12 App Cas per Lord Halsbury LC) or proved "his case sufficiently to justify a judgment in his favour" (*Stoney v. Eastbourne R D Council* [1927] 1 Ch 367, 397 per Lord Hanworth MR).

[56] Thus, a plaintiff has both the burden of proof as well as the initial onus of proof. In *Britestone Pte Ltd v. Smith & Associates Far East Ltd* [2007] 4 SLR 855, the Singapore Court of Appeal per VK Rajah JCA, delivering the judgment of the court, explained that at the start of the plaintiff's case the burden of proof and the onus of proof coincide:

... at the start of the plaintiff's case, the legal burden of proving the existence of any relevant fact that the plaintiff must prove and the evidential burden of some (not inherently incredible) evidence of the existence of such fact coincide. Upon adduction of that evidence, the evidential burden shifts to the defendant, as the case may be, to adduce

A some evidence in rebuttal. If no evidence in rebuttal is adduced, the court may conclude from the evidence of the defendant. If, on the other hand, evidence in rebuttal is adduced, the evidential burden shifts back to the plaintiff. If, ultimately, the evidential burden comes to rest on the defendant, the legal burden of proof of the relevant fact would have been discharged by the plaintiff. The legal burden of proof - a permanent and
B enduring burden - does not shift. A party who has the legal burden of proof on any issue must discharge it throughout. Sometimes, the legal burden is spoken of, inaccurately, as "shifting"; but what is truly meant is that another issue has been engaged, on which the opposite party bears the legal burden of proof

C **[57]** The rule is that "the onus of proof of any particular fact lies on the party who alleges it, not on him who denies it; *et incumbit probation qui decit, non qui negat, Actori incibit probation* ... The plaintiff is bound in the first instance, to show a *prima facie* case, and if he leaves it imperfect, the court will not assist him. Hence the maxim *potior est condition defendantis.* A
D plaintiff cannot obviously advantage himself by the weakness of the defence. A plaintiff's case must stand or fall upon the evidence adduced by him. When, however, the defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter which, if true, is an answer to it, the burden of proof changes sides; and he, in his turn, is bound
E to show a *prima facie* case at least and, if he leaves it imperfect, the court will not assist him. *Reus excipendo fit actor*" (*Woodroffe and Amir Ali*, *supra*, vol. 3 at pp. 3190-3191).

[58] "The party on whom the *onus probandi* lies ... must begin" (*Woodroffe and Amir Ali*, *supra*, vol. 3 at p. 3192). "The strict meaning of the term *onus*
F *probandi* is this: that if no evidence is given by the party on whom the burden is cast, the issue must be found against him" (*Woodroffe and Amir Ali*, *supra*, vol. 3 at p. 3189). "The principle that the party who asserts the affirmative in any controversy ought to prove his assertion, and that he who only denies an allegation may rest on his denial, until, at least, the probable truth of the
G matter asserted has been established, is one which has received the widest recognition. The reason is obvious: to all propositions, which are neither the subject of intuitive or sensitive knowledge or probabilised by experience, the mind suspends its assent until proof of them is adduced or as it has been said: 'Words are but the expression of fact; and therefore, when nothing can be said to be proved'; which is found is probably what is meant by the maxim
H *per rerum naturam, factum negantis probatio nulla est*" (*Woodroffe and Amir Ali*, *supra*, vol. 3 at pp. 3190-3191).

[59] "The test for determining which party has the affirmative, and therefore the burden of establishing a case, is found in the result of an inquiry
I as to which party if no evidence at all being given, the burden being, of course, on the adverse party" (*Woodroffe and Amir Ali*, *supra*, vol. 3 at

p. 3203). That test is codified in s. 102. "The best tests for ascertaining on whom the burden of proof lies, are to ascertain first which party would succeed if no evidence were given on either side; and secondly, what would be the effect of striking out of the record the allegation to be proved. The onus lies on whichever party would fail, if either of these steps was pursued" (*Sarkar supra* at p. 1590).

[60] It would pan out that the respondent, who was the plaintiff, had both the "burden of proof" to make out a *prima facie* case as well as the initial onus of proof to adduce evidence to prove the claim. The onus of proof would only shift to the appellants if the respondent had made out a *prima facie* case. That remained so even though forgery was pleaded. "Now, there is a great distinction between a civil and criminal case, where a question of forgery arises. *In a civil case, the onus of proving the genuineness of a deed is cast upon the party who produces it and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery or otherwise, the party asserting the deed must satisfy the jury that it is genuine* (emphasis added). The jury must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of probabilities. In a criminal case, the onus of proving the forgery is cast upon the prosecutor who asserts it, and unless he can satisfy the jury that the instrument is forged to the exclusion of reasonable doubt, the prisoner must be acquitted" (*Doe D Devine v. Wilson* (1855) 10 Moo PC 502; 14 ER 581, 592 per Sir John Patteson, delivering the opinion of the Privy Council, a decision followed in most common law jurisdictions and recently quoted with approval in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584; [2015] 5 MLJ 1). "*Devine v. Wilson* (1855) 10 Moo PC 502 which while now some 150 years old is good authority that there is an onus on a party tending a document, which is challenged as being a forgery, to prove it is in fact genuine" (*Club Deluxe Ltd And Club Metropolitan and Others* [1995] 2 HKLR 69, 88 per Penlington JA). "Where the genuineness of a deed on which the plaintiff sues, is put in issue, the burden lies on the plaintiff of proving not only the execution, but the *bona fides* of the deed; *Brajeswaree Peshakar v. Budharaddi and Anor*, I, LR, 6 Cal, 268" (*Indian Evidence Act* 10th Edn, by Sir Henry Stewart Cunningham). "We believe the onus is on the party who produces (the document), and asserts its validity. It does not depend on who was the plaintiff. Nor that it was the plaintiffs who sought a declaration that the documents were forged rather than Lawrence who was seeking a declaration that they were genuine" (*Ming Shiu Chung & Ors v. Ming Shiu Sum & Ors* - [2005] HKCU 809 Tang JA (giving reasons for the decision of the court); see also *Mohima Chunder Dhur v. Jugal Kishore Bhuttcharji* (1881) ILR 7 Cal 736, where the plaintiff denied execution of a document and

A brought a suit for declaration that the document was void, and it was held that the burden of proof that the document was genuine and duly it was executed was upon the defendant).

[61] A plaintiff has the onus to begin the case, even if the defence pleads fraud (see also *Grunther Industrial Developments & Gid Ltd v. Federated* B *Employees Insurance Association* (1973) 117 SJ 13 per Cairns LJ). Unless the cause of action is admitted by the defendant (see illustration (b) of s. 102 and *Wee Yue Chew v. Su Sh-Hsyu* [2008] SGHC 50, where the defendant admitted the cause of action and pleaded payment and so must prove that the admitted claim had been discharged by payment), a plaintiff has the burden of proof C as well as the initial onus to prove the claim, *albeit* that the defence is forgery.

[62] In the instant case, the cause of action was not admitted. Given so, the respondent had to discharge the burden as well as the initial onus before the onus could shift to the appellants. If the respondent had not discharged that burden and onus of proof, then the claim should be dismissed, regardless of D whether the defence of forgery had or had not been made out. *Potior est condition defendantis*. The SPA and the instrument of transfer were both executed by Kalidas. The appellants disputed that Kalidas was the lawful attorney of the first appellant. Hence, the respondent had the initial onus to prove that Kalidas was the lawful attorney. It was not the case where it was E proved that the document bore the alleged signature of the defendant, where the onus would then shift to the defendant (see *Udebhan Zangoji v. Vithoba Ukandaji* AIR 1939 Nagpur 78, 79), and where failure to prove forgery could mean that the alleged signature of the defendant must therefore be that of the defendant. It was not like *Alwie Handoyo v. Tjong Very Sumito* [2013] F 4 SLR 308, where the guarantor alleged that the guarantee was a fabrication, and the onus was upon the guarantor to prove fabrication. The authority of Kalidas was disputed. The respondent had the burden to prove that Kalidas had authority to bind the appellants (see *Ardeshir Mama v. Floora Sassoon* AIR 1928 PC 208). It was not where judgment could be entered upon failure of G the defence. For even if it were true that forgery was not proved, it remained that it must be first proved that the impugned PA was valid in order for judgment to be entered. The burden of proving that the SPA was binding rested with the pursuer (see *Ardeshir v. Flora Sasson* AIR 1928 PC 208 at 215). If the impugned PA were not valid, then the SPA could not bind the first appellant, that is, even if forgery were not proved. The impugned PA could H not be valid if it had not complied with the PA Act. If the impugned PA had not complied with the PA Act, then it remained invalid *albeit* that forgery was not proved. The Court of Appeal could not proceed straight from the proposition that forgery was not proved to a conclusion that the validity of the impugned PA was therefore proved (see *Francis and Ors v. Wells And Anor*

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[2007] EWCA Civ 1350 at para 26). A "judge is not always bound to make a finding one way or the other with regard to the facts averred by the parties. He has opened to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take" (*Nulty And Ors v. Milton Keynes Borough Council* [2013] EWCA Civ 15 at para. 32 per Toulson LJ, Longmore and Beatson LJJ in agreement), when the onus "becomes the deciding factor" (*Lakshmanna v. Venkateswarlu* AIR 1949 PC 278).

[63] There is no law which says that a claim automatically succeeds if the defence fails. A claim succeeds only if a *prima facie* claim is made out or the cause of action is admitted, and there is no defence. For the instant claim to succeed, the validity of the impugned PA must first be proved. "The burden of proof under s. 102 of the Evidence Enactment is upon the person who would fail if no evidence at all were given on either side, and accordingly the plaintiff must establish his case. If he fails to do so, it will not avail him to turn round and say that the defendant has not established his" (*Selvaduray v. Chinniah* [1939] 1 LNS 107; [1939] 1 MLJ 253 per Terrel Ag CJ). To say that the impugned PA was valid on account of the fact that forgery was not proved was the wrong approach altogether to address the validity of the impugned PA. If the impugned PA were not valid, then the claim for specific performance must be dismissed, regardless of whether forgery was proved. "As the party who propounded the document, the onus lies on the first respondent to prove that it was genuine, not on the commission to prove that it was a sham: *Club Deluxe v. Club Metropolitan* [1995] 2 HKLR 69 at 82 and 88; *Doe d Devine v. Wilson* (1855) 10 Moo PC 502; *Pacific Electric Wire & Cable Co Ltd v. Texan Management Ltd* (CACV 90, 91, 93-96 of 2012, 17 September 2013)" (*Securities And Futures Commission v. Wang Jian Hua & Ors* [2015] HKCU 2586 per G Lam J). As the propounder, the respondent had the initial onus of proof to show that instrument of transfer upon which he acquired title was executed by the lawful attorney of the first appellant in the exercise of powers granted by a valid power of attorney. If the respondent could not show that the impugned PA was valid, then the instrument of transfer was defective. If the instrument of transfer was defective, then it would follow that the title of the respondent was obtained by a void instrument. Title could not pass to the respondent if the instrument of transfer were not executed by the first appellant or lawful attorney. In the instant case, the respondent relied on a power of attorney, which, on its face, without the form of authentication, was not valid. The burden of proof to establish the claim was not discharged. The impugned PA had no validity. In the result, the instrument of transfer was void.

[64] And the impugned PA remained invalid in spite of the failure of the appellants to cite Kalidas as a respondent in their intermediate appeal against the order of the trial court. After it held that "even if fraud was proven against (Kalidas), it would not defeat the title of the plaintiff as a *bona fide* purchaser for value of the said land under s. 340(2)", the Court of Appeal noted that Kalidas was not a party in the intermediate appeal. On the ramification of that failure to cite Kalidas as a respondent in the intermediate appeal, the Court of Appeal held that "the appellants must be deemed to have accepted the learned trial judge's findings that (Kalidas) was the lawfully appointed attorney of (the first appellant) pursuant to (the impugned PA)". That assumption was legitimate. But that assumption was only legitimate with respect to Kalidas. The logic of the Court of Appeal was that the absence of an appeal against Kalidas connoted acceptance of the findings of the trial court by the appellants. But if that were the logic, then it should also follow, for what is sauce for the goose is sauce for the gander, that the intermediate appeal against the respondent likewise connoted rejection of the findings of the trial court by the appellants. It should not be lost that the respondent was also a party in the action to cancel the impugned PA. The parties agreed that the decision in the action for specific performance would bind the action to cancel the impugned PA. There was no appeal, with respect to Kalidas, which meant, as between appellants and Kalidas that the decision of the trial court in the action for specific performance finally disposed of the action to cancel the impugned PA. In the corollary, the appellants could not further pursue the action to cancel the impugned PA against Kalidas. But the respondent was also a party in the action to cancel the impugned PA. As between appellants and respondent, there was an appeal against the findings of the trial court which kept alive all issues in the action for specific performance and the action to cancel the impugned PA. It was therefore not legitimate to assume that forgery was wholly abandoned when the appellants failed to cite Kalidas as a respondent. But as said, even if forgery were not proved or abandoned for that matter, it remained the burden of the respondent who asserted so to prove that the impugned PA was valid. Unless it was so proved, the claim must fail, even if forgery were not proved. That was not changed by failure of the appellants to cite Kalidas as a respondent. As between appellants and Kalidas, the order of the trial court was final. But as between appellants and respondent, the order of the trial court was not the last word. The decision of this court with respect to appellants and respondent would not bind nor prejudice Kalidas. The decision of this court would not change the result with respect to appellants and Kalidas. Since Kalidas would not be adversely affected by whatever decision of this court, it was therefore not fatal not to have cited Kalidas as a respondent. It would have been fatal only if the decision of this court could adversely affect

Kalidas, which would not happen. There was therefore no basis to say that failure of the appellants to cite Kalidas as a respondent was fatal to the appeal against the respondent.

[65] Both courts below overlooked s. 101 of the Evidence Act, which was the overarching provision before ss. 102 and or 103 would enter the equation. "The elementary rule in onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same" (*Anil Rishi v. Gurbaksh Singh* (2006) 5 SCC 558 per SB Sinha J, commenting on ss. 101 and 102 of the Indian Evidence Act when delivering the judgment of the court). Unless the respondent had made the first move, namely, proved validity of the impugned PA, the appellants were not foisted with any onus to make any counter-move, namely, prove forgery to defeat the claim. It was entirely wrong to award game set and match, so to speak, to the respondent when the respondent, who was the plaintiff, had not even served the first ball, namely, proved validity of the impugned PA, which then and only then would require the appellants to return the ball, with proof of forgery. The respondent asserted that the SPA and the instrument of transfer were executed by Kalidas, the lawful attorney of the registered proprietor. But as the impugned PA was not valid, then, as said, the claim should have been dismissed. It was as simple as that.

[66] Both courts below held and or assumed that the impugned PA was valid, when it was not. Both courts below held that whatever fraud committed against the first appellant was of no consequence against the respondent, when fraud was highly pertinent. Both courts below held that the standing of *bona fide* purchaser was material to the outcome, when the proviso to s. 340(3) of the NLC only protected the title of a subsequent *bona fide* purchaser, of which standing the respondent was not. *Albeit* that the concept of immediate indefeasibility was inapplicable to an immediate purchaser, the Court of Appeal held that the standing of *bona fide* purchaser conferred immediate indefeasibility to the title of the respondent. *Albeit* that the impugned PA was not valid, both courts below saw no defect in the instrument of transfer. For a moment, there was some light. The Court of Appeal correctly held that the defence "was essentially that the SPA is void and unenforceable against (the first appellant) as it was signed by (Kalidas) based on a forged power of attorney and (the respondent) was negligent to have relied on the representation of (Kalidas) without making further enquiry with (the first appellant)" (see para. 55 of the judgment of the Court of Appeal), that "the appellants' burden of proving forgery and negligence was only on a balance of probabilities" (see para. 55 of the judgment of the Court of Appeal) and that "(the first appellant's) pleaded case against the plaintiff

was not premised on fraud but forgery and negligence ... " (see para. 73 of the judgment of the Court of Appeal). The Court of Appeal held that the appellants had to prove forgery on a balance of probabilities (see para. 57 of the judgment of the Court of Appeal). But then, the Court of Appeal conflictingly held "that the falsification of a document ... amounts to fraud" and that the (first appellant's) burden of proving falsification ... was on the higher standard of beyond reasonable doubt" (see para. 63 of the judgment of the Court of Appeal). With respect, the defence was forgery and not falsification of the impugned documents.

[67] In the foregoing, we have concurrently addressed both judgments below as well as the greater part of the legal arguments raised by learned counsel. Hence, we need only to address the rest of the legal arguments, but only where we see it fit, after the following summary of the full submissions.

[68] For the appellants, it was submitted: It was a consolidated trial. Kalidas, who adopted the evidence of the respondent, was a friendly defendant. But the cross-examination of Kalidas who was examined on the documents was not considered by the trial court. The appeal was against the whole of the decision of the trial court. The principal legal issues were (i) whether the courts below conflated the forgery issue and the fraud issue and determined proof of forgery by the use of the wrong standard of proof, (ii) whether the approach taken by the courts below, to require the opinion of a handwriting expert and not to have regard for the compelling evidence of forgery, was misplaced, (iii) whether the respondent, in the circumstances and in the state of its knowledge, could claim to be a *bona fide* purchaser, (iv) whether the respondent could validly become the registered proprietor of the said land in breach of s. 346(5) of the NLC which requires that there be a formal transmission of a deceased's land to the personal representative. The courts below applied the standard of beyond reasonable doubt when it was on a balance of probabilities. Proof of forgery was on the standard of balance of probabilities even before *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd*. Arising from the *Sinnaiyah* decision, the distinction between forgery and fraud is for all purposes eliminated in civil proceedings for purposes of the standard of proof. In any event, it was established by the Federal Court in *Yong Tim v. Hoo Kok Chong* that the standard of proof of forgery in a civil proceeding is on a balance of probabilities. It was wrong to require proof of forgery on the standard of beyond reasonable doubt. *Sinnaiyah*'s case affirmed that the standard of proof of forgery is on a balance of probabilities. An appeal is a continuation of a proceeding (learned counsel cited *PP v. Azilah Hadri & Anor* [2015] 1 CLJ 579; [2015] 1 MLJ 617 at 102, *Lau Keen Fai v. Lim Ban Kay & Anor* [2012] 1 CLJ 569; [2012] 2 MLJ 8 at 9, *Hong Kwi Seong v. Ganad Media Sdn Bhd & Another Appeal* [2012] 8 CLJ 667; [2013] 2 MLJ 251 and *Rohana Ariffin v. Universiti Sains Malaysia & Another Case* [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390; [1989] 1 MLJ 487).

The instant appeal was a pending case and therefore governed by the *Sinnaiyah ratio.* The courts below said that there was no handwriting expert evidence, and consequently failed to consider the following surrounding facts and circumstances: (i) the genuine option for sale dated 9 May 2008 (see appellants' core bundle vol. 3 tab 3) put the sale price of the said land at RM10m, (ii) the proof (see appellants' core bundle vol 3 tab 7) that the first appellant wanted RM10m for the said land, (iii) the offer from one Geldon E Habitation Sdn Bhd to purchase the said land (see appellants' core bundle vol 3 tab 5) which was rejected by the first appellant, (iv) the proof (see appellants' core bundle vol 3 tab 6) that Kalidas was the man behind Geldon, (v) on 25 August 2008, Kalidas offered RM10m for the said land (see appellants' core bundle vol 3 tab 8), and, (vi) the second sale and purchase agreement dated 30 September 2009 (see appellants' core bundle vol 3 tab 12), where Kalidas purportedly purchased the said land from the first appellant for RM770,570. There was no judicial appreciation of the attempt to purchase the said land at RM10m. The application for a replacement title was a false application. The Registrar of Titles testified that it was the first appellant who handed the original document to title to him. The Court of Appeal was wrong on the standard of proof and wrong in its insistence on the evidence of a handwriting expert which was not available and which absence could not be held against the appellants. All effort to submit the impugned PA for expert examination was thwarted by police retention of the impugned PA for purposes of criminal investigation. A court order was obtained for the appointment of a court expert to examine the impugned PA. But the police would not release the original impugned PA. That court order could not be carried out. After several postponements, the Registrar ordered trial to proceed. It is neither a prerequisite nor a rule of law that forgery could only be founded based on an expert's opinion (counsel cited *AGS Harta Sdn Bhd v. Liew Yok Yin* [2010] 7 CLJ 142). Direct evidence should be preferred to that of a handwriting expert (counsel cited *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97). Section 47 of the Evidence Act permits the opinion evidence of any person acquainted with the handwriting to be admitted. The Court of Appeal erred in law in failing to evaluate the direct and circumstantial evidence (counsel cited *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526; [2007] 5 MLJ 136), undeterred by the absence of the opinion of a handwriting expert. Application of the balance of probabilities comes down to whether it is more likely than not (counsel cited *Re S-B Children* [2010] 1 AC 678 at [9 - 10] and *Davies v. Taylor* [1974] 1 AC 207). There was insufficient judicial evaluation of the evidence by reason of the wrong approach taken by the courts below. The following substantial facts proved that the impugned PA was a forgery: (i) the application for a replacement title was premised upon a lie that the title was lost, (ii) Kalidas knew that the document of title was

in the possession of the first appellant, as Kalidas in July 2008 had asked for the same from the first appellant, (iii) the photograph produced of the first appellant receiving a plate from Thanimalai with Kalidas was not that of the giving of any power of attorney but the giving of an option to Thanimalai, (iv) the option stated that the sale price was RM6 psf or RM10,274,542.50, (v) the impugned PA was an incomprehensible document bereft of information on the sale price, which would not have been omitted by the grantor of a power of attorney, (vi) the subject land was in Malaysia where the second appellant was the lawful attorney since 1996, that is after the first appellant obtained probate of the estate on 3 June 1996, (vii) a comparison of the genuine documents, namely the genuine power of attorney to the second appellant and the option, showed that the first appellant was a careful man who ensured that his business documents were legally prepared with proper details, whereas the impugned PA was a haphazard document lacking in authenticity in appearance and content, (viii) the fakeness of the impugned PA could be seen from its inconsistencies and its incomprehensible language, (ix) the address of Kalidas on the impugned PA was false, (x) para. 2 of the impugned PA had no relevance to the sale of a Malaysian property, (xi) para. 3 of the impugned PA wrongly stated the said land as being under mortgage, (xii) para. 4 of the impugned PA was absurd in that it stated that the Malaysian Government paid a paltry compensation, Indian RS10,000, for 2.5 acres of prime land, (xiii) the absurdity of the operative clauses suggested all the hallmarks of a hastily concocted document, (xiv) there was no form of authentication, which was fatal (counsel cite *Maltran Air Corporation Sdn Bhd v. China Airlines Limited & Anor And Another Application* [1993] 1 LNS 38 and *Wan Salimah Wan Jaffar v. Mahmood Omar; Anim Abdul Aziz (Intervener)* [1998] 1 CLJ 480; [1998] 5 MLJ 162), and, (xv) there was no consideration stated in the impugned PA for it to be irrevocable. A false power of attorney is void (counsel cited *Low Poh Kim v. Pengarah Tanah Dan Galian Negeri Selangor & Ors* [2014] 3 CLJ 897; [2015] 7 MLJ 287 and *Puran Singh v. Kehar Singh Bahadur Singh* [1937] 1 LNS 51; [1939] 8 MLJ 71). The subject land which was negotiated for sale at RM10.27m in 2008 was sold in 2009 to the respondent for RM5.56m. It beggared belief that three weeks after the purported sale to the respondent, Kalidas purported to have signed another agreement to purchase the said land for RM770,570. That latter agreement, which was denied by the first appellant, was not witnessed. The respondent's transfer was rejected for reason that the title presented was a photocopy of a title with the features, no watermark and no plan of the land, that the land office considered a fake. In totality, there was ample evidence for a finding that the impugned PA was a forgery. Forgery does not confer indefeasibility (counsel cited *Tan Ying Hong*, *Kamarulzaman Omar* and *Samuel Naik*). If the title used is a fake or a forgery, no valid title can pass (counsel

cited *Au Meng Nam, Sia Hiong Tee & Ors v. Chong Su Kong & Ors* [2015] 8 CLJ 1173, *Rajamani Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors* [2016] 4 CLJ 510; [2016] 3 MLJ 660). *Bona fide* purchaser was no defence. The burden of proving that the purchaser is a *bona fide* purchaser who bought without any knowledge of infirmities in the sale lies with the purchaser himself (counsel cited *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 LNS 96; [1971] 1 MLJ 224). That latter principle is not available to an immediate purchaser where fraud is perpetuated. A corollary principle to defeat the claim of a *bona fide* purchaser is carelessness or negligence or choosing not to enquire on the part of the purchaser (counsel cited *Au Meng Han*). Generally, greater care should be exercised by a purchaser who is not dealing with the vendor but through a person claiming to be his attorney. A reasonable *bona fide* purchaser would examine the power of attorney (counsel cited *Low Poh Kim* and *Jacobs v. Morris* (1902) 1 Ch 816). It was unbelievable that the respondent had not called for nor examined the impugned PA. Any reasonable person looking at the impugned PA would be put on suspicion. The respondent chose out of deliberation or carelessness to proceed with the purchase because of the low price. Section 346(5) of the NLC provides that no personal representative shall be capable of executing any instrument of dealing until it has become registered in his name. Until registration in his name, no personal representative is capable of passing title to a purchaser (counsel cited *Commentary of the National Land Code* by Judith Sihombing, and the *Annotated Statues of Malaysia*, vol 7 p. 3057). The said land had not been transmitted to the first appellant as executor. Since it was prohibited, it was wrong of the trial court to order registration in the name of the respondent.

[69] For the respondent it was submitted: What was the pleaded case at the trial court? If purely predicated on forgery, the standard of proof is on a balance of probabilities. But the case was not purely forgery. Paragraph 3 of the defence asserted forgery. Paragraph 17 of the defence asserted forgery and fraud. "The learned High Court Judge identified the main issue as being whether the registered PA was valid and if not, then it followed that the SPA dated 4 September 2009 would be null and void and of no effect" (para. 40 of the respondent's written submission - RWS). The trial court considered forgery/fraud at paras. 35, 37, 38 and 41 of its judgment. Forgery was wholly dependent on the word of the first appellant. The findings of the trial judge were (i) the dispute between the appellants and Kalidas would not affect the obligation of Kalidas to the respondent (ii) the appellants did not subpoena the police to give evidence and s. 114(g) of the Evidence Act applied, (iii) the appellants did not make an application for the appointment of a court expert to examine the impugned signature, (iv) the action "had been adjourned a few times pending the outcome of the expert verification ... however the verification ... could not be carried out because the original

(impugned PA) was in the custody of the police for investigation" (para. 42 of RWS), (v) the impugned PA complied with ss. 3 and 4 of the PA Act and with s. 85 of the Evidence Act, (vi) it was not the pleaded case that the impugned PA had not complied with s. 3 of the PA Act (vii) in view of the allegation of fraud, the standard of proof was beyond reasonable doubt, which was not discharged, (viii) without other evidence, the mere denial of the first appellant was insufficient, (ix) the first appellant ceremoniously handed the impugned PA to Kalidas on 16 May 2008, an event evidenced by photographs, (x) pursuant to s. 346 of the NLC, the first appellant could register himself on the title as executor and then convey the said land to the respondent, and, (xi) the respondent was a *bona fide* purchaser. The findings of the Court of Appeal were: (i) falsification of a document is a criminal offence and amounts to fraud in a civil case and the standard of proof is beyond reasonable doubt, (ii) pursuant to ss. 102 and 103 of the Evidence Act, each party had to prove its respective case, (iii) it was for the respondent to prove that he was a *bona fide* purchaser on a balance of probabilities while it was for the appellants to prove that the impugned PA was a fabricated document beyond reasonable doubt (iv) the trial court was right in the finding that the respondent was a *bona fide* purchaser, (v) the trial court was right in the finding that the appellants had not proved that the impugned PA was forged, (vi) fraud directed at Kalidas would not affect the standing of the respondent as a *bona fide* purchaser, (vii) Kalidas was not made a party in the appeal, which meant that the appellants accepted the finding of the trial court that Kalidas was the lawful attorney of the appellant, and, (ix) appellate interference was not warranted. Forgery was wholly dependent on the word of the first appellant. Even on the balance of probabilities, the appellants had not discharged the burden. Kalidas was not a respondent in the appeal against dismissal of the action to set aside the impugned PA. The documents highlighted by counsel for the appellants were not put to Kalidas to answer, and were raised for the first time. In relation to leave question 1 and on the subject of fraud, *Ang Hiok Seng v. Yim Yut Kiu* [1997] 1 CLJ 497 and *PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 1 LNS 55 should be considered. As for leave question 2, the courts below did not treat a complaint of forgery as a complaint of fraud. The courts below were correct to hold that the burden of proof of the allegations of falsification and or forgery was on a beyond reasonable doubt basis, which was the extent law then (counsel cited *Ang Hiok Seng, Yong Tim v. Hoo Kok Chong & Anor*, *Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd* [2007] 2 CLJ 1). *Sinnaiyah* only applied to that appeal and to future cases and could not be used to set aside past decisions. As for leave question 3, the court should determine an allegation of forgery after consideration of the credibility of the witnesses and any expert evidence (counsel cited *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd*). *United Asian Bank Bhd* had answered leave question 3.

The issue of forgery was a question of fact and not a question of law for determination by the apex court (counsel cited *Dato' Robert Teo Keng Tuan v. Metroplex Bhd* [2013] 9 CLJ 681). There were no pleadings on the defects in the impugned PA. The pleaded defence was not based on forgery alone. The appellants could not advance a case based on forgery alone. The defence of forgery was an afterthought (counsel cited *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330). There were no pleaded particulars of fraud. By accepting the impugned PA for registration, the Registrar was satisfied that it would have been duly authenticated (counsel cited *Melantrans*). The respondent was entitled to regard Kalidas as the lawful attorney. The trial court was right to hold that a denial was insufficient to prove that the impugned PA was not so executed ... "as the pleaded case of the appellants (was that) the signature on the registered PA was falsified and their version as well as the circumstances of the case (made) it clear that the appellants' defence involved an allegation of fraud which required a higher standard of proof ... " (see pp. 43-44 of RWS). Whilst under cross-examination, the first appellant did not confirm that the impugned signature was not his. In relation to leave questions 4 and 5, it is trite that the burden of establishing a case rests on the party who asserts the affirmative of the issue (counsel cited *International Times & Ors v. Leong Ho Yuen*). The party who asserts that the document is not genuine must prove it. The respondent proved *bona fide* purchaser. "Since the power of attorney is valid and enforceable, therefore the same would apply to the SPA ... " (see p. 55 of RWS). The trial court ruled that the respondent was a *bona fide* purchaser and that all transactions were in accordance with the SPA. The Court of Appeal stated that "under ss. 102 and 103 of the Evidence Act 1950, the burden is on the (appellants and respondent) to prove their respective pleaded case" (see p. 55 of RWS). The courts below did not err by placing the wrong burden. There was no appeal by the Registrar of Titles against the order of the trial court. That meant that the Registrar of Titles accepted that the rejection of transfer was wrong. The respondent was not present at the enquiry conducted by the Registrar of Titles. Leave question 6, was a hypothetical question, as there was an application for transmission. It was not the pleaded case that there was failure to comply with s. 345 of the NLC. "The fact that title to the land was registered in the name of the deceased proprietor could not prohibit the first appellant from transferring the land to the respondent" (see p. 67 of RWS). As executor, the first appellant could be registered as trustee pursuant to a transmission under s. 346 of the NLC. An application for transmission was presented on 30 December 2009, by the respondent's solicitors. As beneficial owner, the respondent was even entitled to call upon the court to vest the said land to him, as an alternative to a transfer (counsel cited *Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Hussin* [1997] 3 CLJ 854).

[70] In the respondent's written submission in reply, learned counsel further submitted: The suggestion that sale price to the respondent was not fair market value was not supported by evidence. The first appellant wanted RM6 psf. But since 2004 there were no buyers at that price. At the material time, the respondent was not aware of the second SPA. There was no power of sale in the power of attorney granted to the second appellant. It was unreasonable to portray that the first appellant could not have appointed Kalidas, as the powers granted to Kalidas were different. The judgments below were read out of context. The courts below had not conflated the issues. That the appellants' case was based on forgery and fraud could be seen from paras. 17 and 18 of the amended defence. It was not open to the appellants to argue that their case was based only on fraud, for that would be a departure from their pleadings. *Sinnaiyah* could not apply, as the instant case was filed in 2010 and decided in 2013. The extant law then for proof of fraud was on the standard of beyond reasonable doubt. *Sinnaiyah* could not be applied with retrospective effect (counsel cited *Abu Bakar Mohd Kassim & Ors v. Mohd Yusoff Mohd Kassim* [2016] 1 LNS 247). The Court of Appeal did not say that evidence of a handwriting expert was necessary for proof of forgery. What the Court of Appeal said was that the oral evidence of the first appellant was not of much probative value in the light of other contemporaneous documents. No effort was made to procure the impugned PA from the police. Section 114(g) of the Evidence Act was rightly invoked. Unlike *AGS Harta Sdn Bhd* and *Lee Ing Chin* cited by the appellants, there was insufficient evidence in the instant case to support forgery except for the testimony of the first appellant. The denial of the first appellant that he handed the impugned PA to Kalidas was contrary to the photographs which showed that the first appellant handed some documents to Kalidas. Objection was taken to the line of cross-examination that the impugned PA lacked consideration. There was no evidence that there was an application for a replacement title. It was not pleaded that the title presented for registration was a fake. It was only pleaded that the presentation of transfer was made without the title. The inquiry was made without notice to the respondent. In the absence of an appeal by the Registrar of Titles against the order of the trial court, it could not be argued that the transfer was rejected to support the allegation of forgery.

[71] That might not have been intended. But the aforesaid submissions served to affirm (i) that the courts below indeed treated s. 102 of the Evidence Act as a standalone provision which it was not, and (ii) that the courts below indeed imposed the "burden" on the respondent to prove *bona fide* purchaser on a balance of probabilities and the "burden" on the appellants to prove forgery/fraud on the standard of beyond reasonable doubt, which respective burden it was not, as the claim for specific performance which was wholly reliant on the validity of the impugned PA

and not "*bona fide* purchaser" had to be first made out to shift the onus to the appellants to prove forgery/fraud. Section 101 of the Evidence Act comes before s. 102. But the cart was put before the horse. To say that each had a burden of proof - the respondent to prove *bona fide* purchaser on a balance of probabilities and the appellants to prove forgery/fraud on the standard of beyond reasonable doubt - was entirely wrong. As said, the respondent had the burden as well as the initial onus of proof, which never shifted, to make out a *prima facie* claim for specific performance. There was no onus to prove forgery and or fraud if the validity of the impugned PA were not first proved. Without the validity of the impugned PA, the claim for specific performance had no leg to stand on, regardless of whether the defence of forgery and or fraud had or had not been proved. To impose the "burden" to the appellants to prove forgery and or fraud, when proof of "*bona fide* purchaser" was wholly immaterial and when the validity of the impugned PA was not proved, was a serious misdirection on the burden of proof.

[72] Another serious misdirection on the part of the Court of Appeal was to require proof of forgery on the standard of beyond reasonable doubt. At para. 63 of its judgment, the Court of Appeal held that the instant forgery was falsification of a document, which falsification was a criminal offence and also fraud in a civil case, and which fraud therefore required proof on the standard of beyond reasonable doubt. It could not be denied that forgery is a fraud, and that forgery of the signature on a document is falsification of a document. Forgery is a fraud. But if forgery were to be held as fraud without distinction and so to be proved beyond reasonable doubt, then forgery could not have been, pre-*Sinnaiyah*, an exception to the standard of proof for fraud. But forgery, *albeit* a fraud, was an exception to the standard of proof for fraud. It was a serious misdirection on the standard of proof to require the instant complaint of forgery to be proved beyond reasonable doubt.

[73] As stated, even before *Sinnaiyah*, the standard of proof for forgery was on a balance of probabilities. It would not make any difference even if *Sinnaiyah* were not to apply to the instant appeal. Even based on the pre-*Sinnaiyah* law, the courts below applied the wrong standard of proof. But would *Sinnaiyah* not apply to the instant appeal?

[74] In *Sinnaiyah*, the court said "we should make it clear that this judgment only applies to this appeal and to future cases and should not be utilised to set aside or review past decisions involving fraud in civil claims". What amounts to a future case was not said. In *Md Hilmi Md Noor & Anor v. Azman Ahmad & Ors* [2016] 7 CLJ 360; [2016] 6 MLJ 205, it was argued that an appeal from the trial court qualified as a 'future' case as stated in *Sinnaiyah*. The Court of Appeal asked "what did the apex court mean by reference to 'future' cases in its judgment?"

[75] The respondent argued that *Sinnaiyah* could not apply to the instant case, as it was filed in 2010 and decided by the trial court in 2013 before *Sinnaiyah*, which argument even went beyond the objection of retroactivity, which is that the judge can change the law only by applying to the decision of a case a law different from that in force at the time the legal process in the case was initiated (see '*Judges and Lawyers*' by Lord Devlin, Modern Law Review 1976, vol. 39 at p. 10).

[76] The appellants argued that *Sinnaiyah* applies to all pending cases, including appeals. Indeed, in *JCT Ltd v. Muniandy Nadasan & Ors And Another Appeal* [2016] 3 CLJ 692; [2016] 6 MLJ 635, it was held by the Court of Appeal per Abang Iskandar JCA that an ongoing appeal is a future case as stated in *Sinnaiyah*:

> We are of the view that the proper standard of proof, required to be proved as stated by the apex court in the *Sinnaiyah* case in a civil case involving allegation of fraud is applicable to this case. This is because this case, being an on-going appeal, is therefore, still a 'live' case, as opposed to those cases which had been finally adjudicated in terms of their final appeals. To our mind, that was what the apex court had meant when it said that the ruling did not have a retrospective effect. It does not apply to cases that had been finally decided. It is our considered view that all the cases pending disposal in the appeal courts would qualify as 'future' cases referred to in the *Sinnaiyah* case because it would be incongruous indeed for the appeal courts to apply a wrong law in deciding those cases which final fate have not yet been finally determined. All cases which are pending final disposal of their appeals, are therefore included in the so-called 'future cases' in the *Sinnaiyah* case.

[77] In *Lee Hark Lam & Ors v. Kebun Rimau Sdn Bhd & Anor And Another Appeal* [2017] 1 CLJ 277; [2016] 6 MLJ 751, the Court of Appeal followed *JCT Ltd v. Muniandy Nadasan & Ors* and said:

> We are mindful of the fact that the Federal Court in *Sinnaiyah* had made it clear that the judgment only applied to that appeal and to future cases, we nevertheless consider the phrase 'future cases' covers an on-going appeal such as the present appeals before us. We find support in this premise in the Court of Appeal's decision in *JCT Ltd v. Muniandy Nadasan & Ors and Another Appeal* [2016] 6 MLJ 621; [2016] 3 CLJ 692 which decided that the words 'future cases' encompassed an on-going appeal.

[78] It should be a given that "when the judges state what the law is, their decisions do ... have a retrospective effect" (*Kleinwort Benson Ltd v. Lincoln City Council And Other Appeals* [1998] 4 All ER 513 per Lord Goff). "As Lord Goff of Chieveley in his speech demonstrates, in the absence of some form of prospective overruling, a judgment overruling an earlier decision is bound to operate to some extent retrospectively: once the higher court in the

particular case has stated the changed law, the law as so stated applies not only to that case but also to all cases subsequently coming before the courts for decision, even though the events in question in such cases occurred before the Court of Appeal decision was overruled" (*Kleinwort Benson Ltd* per Lord Browne-Wilkinson). "Developments in the common law apply retrospectively unless, exceptionally, the court makes an order for prospective overruling ..." (*Lymington Marina Ltd v. Macnamara And Others* [2007] EWCA Civ 151 per Arden LJ, Pill LJ and Sir Martin Nourse in agreement).

[79] Pertinent to a ruling in the prospective form to limit the temporal effect of its ruling, so as to mitigate the adverse consequences of a ruling which is different from what the law has previously been understood to be, in *National Westminster Bank plc v. Spectrum Plus Limited & Ors* [2005] UKHL 41, it was submitted that the power of the House was to give a ruling in "prospective only" form. Lord Nicholls (Lords Steyn, Hope and Walker in agreement) first highlighted the following four "features" of the English judicial system:

> 4. The starting point is to note some basic, indeed elementary, features of this country's judicial system. The first concerns the essential role of courts of law. In the ordinary course the function of a court is adjudicative. Courts decide the legal consequences of past happenings. Courts make findings on disputed questions of fact, identify and apply the relevant law to the facts agreed by the parties or found by the court, and award appropriate remedies.
>
> 5. The second feature concerns the wider effect of a court decision on a point of law. To promote a desirable degree of consistency and certainty about the present state of 'the law', courts in this country have long adopted the practice of treating decisions on a point of law as precedents for the future. If the same point of law arises in another case at a later date a court will treat a previous decision as binding or persuasive, depending upon the well-known hierarchical principles of '*stare decisis*'.
>
> 6. The third feature is that from time to time court decisions on points of law represent a change in what until then the law in question was generally thought to be. This happens most obviously when a court departs from, or an appellate court overrules, a previous decision on the same point of law. The point of law may concern the interpretation of a statute or it may relate to a principle of 'judge-made' law, that is, the common law (which for this purpose includes equity). A change of this nature does not always involve departing from or overruling a previous court decision. Sometimes a court may give a statute, until then free from judicial interpretation, a different meaning from that commonly held.
>
> 7. The fourth feature is a consequence of the second and third features. A court ruling which changes the law from what it was previously thought to be operates retrospectively as well as prospectively. The ruling will have a retrospective effect so far as the parties to the particular dispute are

concerned, as occurred with the manufacturer of the ginger beer in *Donoghue v. Stevenson* [1932] AC 562. When Mr Stevenson manufactured and bottled and sold his ginger beer the law on manufacturers' liability as generally understood may have been as stated by the majority of the Second Division of the Court of Session and the minority of their Lordships in that case. But in the claim Ms Donoghue brought against Mr Stevenson his legal obligations fell to be decided in accordance with Lord Atkin's famous statements. *Further, because of the doctrine of precedent the same would be true of everyone else whose case thereafter came before a court. Their rights and obligations would be decided according to the law as enunciated by the majority of the House of Lords in that case even though the relevant events occurred before that decision was given*. (emphasis added)

[80] Lord Nicholls thus commented on the retrospective effect of a change in the law and the different forms of prospective overruling:

8. People generally conduct their affairs on the basis of what they understand the law to be. This 'retrospective' effect of a change in the law of this nature can have disruptive and seemingly unfair consequences. 'Prospective overruling', sometimes described as 'non-retroactive overruling', is a judicial tool fashioned to mitigate these adverse consequences. It is a shorthand description for court rulings on points of law which, to greater or lesser extent, are designed not to have the normal retrospective effect of judicial decisions.

9. Prospective overruling takes several different forms. In its simplest form prospective overruling involves a court giving a ruling of the character sought by the bank in the present case. Overruling of this simple or 'pure' type has the effect that the court ruling has an exclusively prospective effect. The ruling applies only to transactions or happenings occurring after the date of the court decision. All transactions entered into, or events occurring, before that date continue to be governed by the law as it was conceived to be before the court gave its ruling.

10. Other forms of prospective overruling are more limited and 'selective' in their departure from the normal effect of court decisions. The ruling in its operation may be prospective and, additionally, retrospective in its effect as between the parties to the case in which the ruling is given. Or the ruling may be prospective and, additionally, retrospective as between the parties in the case in which the ruling was given and also as between the parties in any other cases already pending before the courts. There are other variations on the same theme.

[81] Lord Nicholls observed that prospective overruling had not yet been adopted as a practice in England:

12. Prospective overruling has not yet been adopted as a practice in this country. The traditional approach was stated crisply by Lord Reid in *Birmingham City Corp v. West Midland Baptist (Trust) Association (Inc)* [1969] 3 All ER 172 at 180, [1970] AC 874 at 898-899, a case concerning compulsory acquisition:

> We cannot say that the law was one thing yesterday but is to be something different tomorrow. If we decide that [the existing rule] is wrong we must decide that it always has been wrong, and that would mean that in many completed transactions owners have received too little compensation. But that often happens when an existing decision is reversed.
>
> 13. In *Morgans v. Launchbury* [1972] 2 All ER 606 at 611, [1973] AC 127 at 137, Lord Wilberforce noted: 'We cannot, without yet further innovation, change the law prospectively only'. More recently, in *Kleinwort Benson Ltd v. Lincoln City Council* [1998] 4 All ER 513 at 536, [1999] 2 AC 349 at 379, Lord Goff of Chieveley said the system of prospective overruling 'has no place in our legal system'.

[82] His Lordship then observed that "the possibility of a change in this practice has been raised from time to time", but the nearest the House had come to giving non-retrospective rulings was in two decisions on the law of undue influence (*Barclays Bank Plc v. O'Brien* [1993] 4 All ER 417, [1994] 1 AC 180 and *Royal Bank of Scotland v. Etridge (No 2)*, *Barclays Bank Plc v. Coleman, Bank of Scotland v. Bennett, Kenyon-Brown v. Desmond Banks & Co (a firm)* [2001] UKHL 44, [2001] 4 All ER 449, [2002] 2 AC 773), where the wife claimed her consent to a mortgage of her share in a jointly-owned home was procured by her husband exercising undue influence over her, and where in both cases the House said that, in order to avoid being fixed with constructive notice of the wife's rights, a bank could reasonably be expected to bring home to the wife the risks she was running. Lord Nicholls then further imparted that in both cases, the House sought to give guidance by being more specific on what that test meant in practice and that it was in that limited respect that in both cases the House, having regard to realities, drew a distinction between past and future transactions. In *Barclays Bank Plc v. O'Brien*, Lord Browne-Wilkinson said that whether the steps taken by the creditor satisfied the prescribed test would, for past transactions, depend on the facts of each case, and for the future, an appropriately worded warning given at a private meeting between the creditor and the wife. In *Royal Bank of Scotland v. Etridge (No 2)* the House decided that holding a private meeting was not the only way a bank could discharge its obligation to bring home to the wife the risks she was running. His Lordship said that "those two decisions illustrate the flexibility inherent in this country's legal system".

[83] One important observation of His Lordship was that in the devolution legislation of 1998 "Parliament made express provision (Scotland Act 1998, s. 102, Government of Wales Act 1998, s. 110 and the Northern Ireland Act 1998, s. 81) for courts to have power to limit the temporal effect of a particular class of decisions ... these provisions show that Parliament does not perceive non-retroactive rulings by courts as being of their nature inconsistent with the Judiciary's proper function". In other words,

prospective rulings are consistent with judicial functions. Other notable observations of His Lordship were that "in other common law countries prospective overruling has taken root as such only in the *United States of America and India* (in constitutional matters, and in Ireland (see *Murphy v. Attorney-General* [1982] I R 241 and *The Law Quarterly Review*, vol. 120 at p. 8)" and that "the essence of the principled argument against prospective overruling is that in this country prospective overruling is outside the constitutional limits of the judicial function ... would amount to the judicial usurpation of the legislative function ... only prospective effect, it is said, is not inherent in the judicial role". His Lordship then said that "instances where this power has been used in courts elsewhere suggest there could be circumstances in this country where prospective overruling would be necessary to serve the underlying objective of the courts of this country: to administer justice fairly and in accordance with the law. There could be cases where a decision on an issue of law, whether common law or statute law, was unavoidable but the decision would have such gravely unfair and disruptive consequences for past transactions or happenings that this House would be compelled to depart from the normal principles relating to the retrospective and prospective effect of court decisions ... If, altogether exceptionally, the House as the country's Supreme Court were to follow this course I would not regard it as trespassing outside the functions properly to be discharged by the Judiciary under this country's constitution". The House of Lords affirmed that prospective overruling could be necessary in certain circumstances but rejected the submission that the decision of the House should have prospective only effect.

[84] In *Cadder v. Her Majesty's Advocate* [2010] UKSC 43, the Supreme Court of the United Kingdom revisited "prospective overruling" which it said "was the most difficult and anxious of the issues" before the court. It was held that Cadder's rights under art. 6(1) of the European Convention on Human Rights had been breached because he had been denied access to a solicitor before he was interviewed by the police. On whether that decision was retrospective and prospective or prospective only, Lord Hope (Lords Rodger, Walker, Brown, Mance, Kerr in agreement) enlightened that its decision would apply to cases which have not yet gone to trial or are still in progress and to appeals that have been brought timeously but have not yet been concluded which would have to be dealt with on the basis that a person who is detained must have had access to an enrolled solicitor before being questioned by the police, unless in the particular circumstances of the case there were compelling reasons for restricting this right, that its decision would not permit the re-opening of closed cases, and that the retrospective effect is excluded from cases that have been finally determined:

> 58. There are now a considerable number of dicta to the effect that the court has a general inherent power to limit the retrospective effect of its decisions: see, for example, *In re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680; *Ahmed v. HM Treasury (no 2)* [2010] UKSC 5, [2010] 2 WLR 378, para 17 ...

59. Had it been open to us to do so, I would have wished to exercise the inherent power in this case. But I have come to the conclusion that the statutory regime that applies to this case precludes our doing so. Furthermore, it would not be right to deny the Appellant, and other Appellants like him who have taken the point timeously, an appropriate remedy for breach of the Convention right. I would have felt less inhibited if the Grand Chamber had made it clear in *Salduz* that it was departing from its previous case law and that it was laying down a new principle ...

60. That is not to say that the principle of legal certainty has no application. On the contrary, I think that there are strong grounds for ruling today, on the basis of this principle and bearing in mind the fact that the *Salduz* objection could have been raised at any time after the right of challenge on Convention grounds became available, that the decision in this case does not permit the re-opening of closed cases. Cases which have not yet gone to trial, cases where the trial is still in progress and appeals that have been brought timeously (see s. 100(3) of the Scotland Act 1998, as amended by the Convention Rights Proceedings (Amendment) (Scotland) Act 2009 to which Lord Rodger refers in paras 105 and 106) but have not yet been concluded will have to be dealt with on the basis that a person who is detained must have had access to an enrolled solicitor before being questioned by the police, unless in the particular circumstances of the case there were compelling reasons for restricting this right. As for the rest, I would apply Murray CJ's dictum that the retrospective effect of a judicial decision is excluded from cases that have been finally determined: *A v. The Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88, para 36.

62. ... I would hold that convictions that have become final because they were not appealed timeously, and appeals that have been finally disposed of by the High Court of Justiciary, must be treated as incapable of being brought under review on the ground that there was a miscarriage of justice because the accused did not have access to a solicitor while he was detained prior to the police interview ... .

[85] Lord Rodger (Lords Hope, Rodger, Walker, Brown, Mance, Kerr in agreement) agreed that a change in the law applies to all cases that are still alive:

98. Any changes in the relevant legislation or practices will, of course, apply only to future cases. At the hearing of the appeal the Lord Advocate submitted that, if the court were to decide against the Crown, it should make a ruling with only prospective effect. As she pointed out, since 1999 the Scottish courts have dealt with many thousands of cases in which the Crown obtained convictions by relying, to a greater or lesser extent, on answers to questioning under s. 14 of the 1995 Act. The court should not make a ruling that would throw these convictions into doubt.

99. The Lord Advocate's submission appeared to be based on an apprehension that, unless the court took some exceptional step, a decision to allow this appeal would operate retroactively to undermine any

convictions which had been obtained in reliance on evidence from police questioning in cases completed since May 1999. That would, however, be to adopt an extreme version of the accepted doctrine that courts declare not only what the law is, but what it has always been. And it would be to adopt a theory which has never been applied to other well-known appellate decisions that were perceived to alter the law as it had previously been understood.

100. The effect of a decision which develops the law was examined by the Supreme Court of Ireland in *A v. The Governor of Arbour Hill Prison* [2006] 4 IR 88. In June 2004 A pleaded guilty to, and was convicted of, unlawful carnal knowledge, contrary to s 1(1) of the Irish Criminal Law (Amendment) Act 1935. Then, on 23 May 2006, in *CC v. Ireland* [2006] 4 IR 66, the Supreme Court declared that s 1(1) was inconsistent with the Irish Constitution. Three days later, A applied for an order for his release on the ground that his detention, by virtue of a sentence of imprisonment following his conviction in 2004 under s. 1(1), was unlawful because that provision had now been declared to be unconstitutional. The Supreme Court rejected that argument and held that the declaration of inconsistency in *CC v. Ireland* applied to the parties in that case, or in related litigation, and prospectively, but that it did not apply retrospectively, unless there were wholly exceptional circumstances.

101. The very full judgments in *A v. The Governor of Arbour Hill Prison* repay study. But for present purposes guidance can be derived from the judgment of Murray CJ, [2006] 4 IR 88, 117, paras 36-38:

> 36 Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law, such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position.
>
> 37 Only a narrow approach based on absolute and abstract formalism could suggest that all previous cases should be capable of being reopened or relitigated (even if subject to a statute of limitations). If that absolute formalism was applied to the criminal law it would in principle suggest that every final verdict of a trial or decision of a court of appeal should be set aside or, where possible, retried in the light of subsequent decisions where such

> subsequent decision could be claimed to provide a potential advantage to a party in such a retrial. In principle both acquittals and convictions could be open to retrial. But one has only to pose the question to see the answer. No one has ever suggested that every time there is a judicial adjudication clarifying or interpreting the law in a particular manner which could have had some bearing on previous and finally decided cases, civil or criminal, that such cases be reopened or the decisions set aside.
>
> 38 It has not been suggested because no legal system comprehends such an absolute or complete retroactive effect of judicial decisions. To do so would render a legal system uncertain, incoherent and dysfunctional. Such consequences would cause widespread injustices.'

102. Murray CJ's description of the effect of a decision which alters the law as previously understood can be applied to Scots law. For instance, in *Smith v. Lees* 1997 JC 73 the Court of Five Judges overruled *Stobo v. HM Advocate* 1994 JC 28, 1994 SLT 28 and thereby laid down a more restrictive test for corroboration in cases of sexual assault. The new test applied to the Appellant's case and to other cases that were still live. But it could never have been suggested that the decision meant that convictions in completed cases, which had been obtained on the basis of the law as laid down in *Stobo*, were *ipso facto* undermined or invalidated. Similarly, in *Thompson v. Crowe* 2000 JC 173, the Full Bench overruled *Balloch v. HM Advocate* 1977 JC 23 and re-established the need to use the procedure of a trial within a trial when the admissibility of statements by the accused is in issue. But, again, this had no effect on the countless completed cases where convictions had been obtained on the basis of evidence of such statements by the accused which judges had admitted in evidence without going through that procedure. So, here, the court's decision as to the implications of art. 6(1) and (3)(c) of the Convention for the use of evidence of answers to police questioning has no direct effect on convictions in proceedings that have been completed. To hold otherwise would be to create uncertainty and, as Murray CJ rightly observes, cause widespread injustices. And the Strasbourg court has pointed out that the principle of legal certainty is necessarily inherent in the law of the European Convention: *Marckx v. Belgium* (1979) 2 EHRR 330, 353, para 58. In the Irish case Geoghegan J said, [2006] 4 IR 88, 200, para 286, that he was "satisfied ... that it would be wholly against good order if convictions and sentences which were deemed to be lawful at the time they were decided had to be reopened". I emphatically agree. And that policy is, of course, embodied in s. 124 of the 1995 Act which makes interlocutors and sentences pronounced by the appeal court "final and conclusive and not subject to review by any court whatsoever", except in proceedings on a reference by the Scottish Criminal Cases Review Commission.

[86] In *PP v. Hue An Li* [2014] 4 SLR 661, Sundaresh Menon CJ, delivering the judgment of the court, imparted that the Singapore Court of Appeal recognised the doctrine of prospective overruling and applied it on two

occasions (*PP v. Manogaran R Ramu* [1996] 3 SLR(R) 390 and *Abdul Nasir Amer Hamsah v. PP* [1997] 2 SLR(R) 842) and said that prospective overruling is not restricted to criminal law. Noting that legal systems at either end of the spectrum (that is, those which adopt purely prospective overruling and those which adopt purely retroactive overruling) would yet be apt to produce their own brands of injustice, Sundaresh Menon CJ provided the following framework to guide judges in the exercise of discretion, in exceptional circumstances, to restrict the retrospective effect of their pronouncements:

> This discretion is to be guided by the following factors:
>
> (a) The extent to which the law or legal principle concerned is entrenched: The more entrenched a law or legal principle is, the greater the need for any overruling of that law or legal principle to be prospective. This will be measured by, amongst other things, the position of the courts in the hierarchy that have adopted the law or legal principle that is to be overruled and the number of cases which have followed it. A pronouncement by our Court of Appeal which exhaustively analyses several disparate positions before coming to a single position on a point of law will be more entrenched than a passing pronouncement on that same point of law by a first-instance court. Similarly, a law or legal principle cited in a long line of cases is more entrenched than one cited in a smaller number of cases.
>
> (b) The extent of the change to the law: The greater the change to the law, the greater the need for prospective overruling. A wholesale revolutionary abandonment of a legal position (as was done in, for instance, *Manogaran* ([110] *supra*) is a greater change than an evolutionary reframing of the law (see, for instance, *Sembcorp Marine Ltd v. PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193, which re-examined the distinction between interpretation and implication in contract law, but by and large built on the foundations laid down by prior cases).
>
> (c) The extent to which the change to the law is foreseeable: The less foreseeable the change to the law, the greater the need for prospective overruling. In *SW v. UK* ([113] *supra*), for example, the abolition of the doctrine of marital immunity was eminently foreseeable because of past judicial pronouncements which had expressed distaste for the doctrine and progressively expanded the exceptions to it. There was therefore no need to curtail the retroactive application of the change in the legal position.
>
> (d) The extent of reliance on the law or legal principle concerned: The greater the reliance on the law or legal principle being overruled, the greater the need for prospective overruling. This factor is particularly compelling in the criminal law context, where a person's physical liberty is potentially at stake. Quite apart from Art. 11(1) of the Singapore Constitution, a person who conducts his affairs in reliance on the ostensible legality of his actions would be unfairly taken by surprise if a retrospective change to the law were to expose him to criminal liability.

> 125 We stress that this framework lays down a factors-based test; as such, no one factor is preponderant over any other, and no one factor is necessary before prospective overruling can be adopted in a particular case. Indeed, a first-time judicial pronouncement, despite generally not fulfilling the first three factors listed at [124] above, could conceivably warrant prospective overruling. We refer to the exceptional facts of *Abdul Nasir* ([122] *supra*) as an analogous example. Prior to that decision, there was no Singapore case which had pronounced on the meaning of life imprisonment, but the Executive had consistently taken it to mean 20 years' imprisonment. Offenders had pleaded guilty or conducted their defences on the basis that life imprisonment was understood to mean imprisonment for 20 years, and it would have been grossly unfair if the rug had been pulled from under their feet, especially as this concerned their physical liberty.

[87] In Malaysia, the doctrine of prospective overruling had been applied in criminal cases and in an application that pertained to a court circular on auction sale (*Tan Beng Sooi v. Penolong Kanan Pendaftar (United Merchant Finance Bhd, Intervenor)* [1995] 2 CLJ 846; [1995] 2 MLJ 421). In *PP v. Dato' Yap Peng* [1987] 1 LNS 28; [1987] 2 MLJ 311, it was held by the former Supreme Court (majority) that s. 418A of the Criminal Procedure Code was unconstitutional and void as being an infringement of the provisions of art. 121(1) of the Federal Constitution and that the doctrine of prospective overruling would be applied so as not to give retrospective effect to the declaration made with the result that all proceedings of convictions and acquittals which had taken place under the section prior to the date of that judgment would remain undisturbed and not be affected. In *Mamat Daud & Ors v. The Government Of Malaysia* [1988] 1 CLJ 11; [1988] 1 CLJ (Rep) 197; [1988] 1 MLJ 119, it was declared by the former Supreme Court (majority) that s. 298A of the Penal Code was invalid and therefore null and void and of no effect but that the declaration would not apply to the Federal Territories of Kuala Lumpur and Labuan and would take effect from the date of the order, that is 13 October 1987. In *Repco Holdings Bhd v. PP* [1997] 4 CLJ 740; [1997] 3 MLJ 681, the Court of Appeal, per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court, declared both s. 126(2) of the Securities Industry Act 1983 and s. 39(2) of the Securities Commission Malaysia Act 1993 to be unconstitutional, null and void, but the declaration was prospective only, to include that case and cases registered from the date of the declaration.

[88] Prospective overruling had been applied in Malaysia. But was it applied in *Sinnaiyah*, such that it had no retrospective effect, even to the instant appeal from a decision decided by the trial court before the change in the law? "It is a fundamental principle of adjudicative jurisprudence that all judgments of a court are retrospective in effect" (*Abillah Labo Khan v. PP*

A [2002] 3 CLJ 521; [2002] 3 MLJ 298 per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court). "The law as so stated applies not only to that case but also to all cases subsequently coming before the courts for decision, even though the events in question in such cases occurred before the ... decision was overruled" (*Kleinwort Benson Ltd*). "Because of the B doctrine of precedent, the same would be true of everyone else whose obligations would be decided according to the law as enunciated ... even though the relevant events occurred before that decision was given" (Lord Nicholl's fourth "feature" in the judicial system, see also *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 MLJ 393, where it was held C by the court per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court, that the Court of Appeal was bound to follow *Muhammed bin Hassan*, notwithstanding that the conviction was handed down before the change in the law). The law as so stated in a superior judgment would apply to cases which have not yet gone to trial or are still in progress and to appeals that have been brought timeously but have not yet been concluded (*Cadder* D *v. Her Majesty's Advocate* per Lord Hope) and to matters or cases not yet finally determined, but the retrospective effect of a judicial decision is excluded from cases already finally determined (*Cadder v. Her Majesty's Advocate* per Lord Rodger). That is the common law position. There was no departure in *Sinnaiyah* from the common law position when the court said E "we should make it clear that this judgment only applies to this appeal and to future cases and should not be utilised to set aside or review past decisions involving fraud in civil claims". The court merely underscored the retrospective and prospective effect of its decision, to apply to that appeal and to future cases, to cases as yet not filed and trials or appeals which have F yet to be finally determined, but not to past cases which have reached a terminal end. The ruling in *Sinnaiyah* was not in the prospective only form. *Sinnaiyah* applies to all cases that have not been finally determined, including all pending appeals, except that in the instant appeal, it does not matter.

[89] Much was said, but not with one voice, on the pleadings. The trial G court held that forgery and or fraud was not specifically pleaded (see para. 38 of the judgment of the trial court). The Court of Appeal variously held that the pleaded defence "was essentially that the SPA is void and unenforceable against (the first appellant) as it was signed by (Kalidas) based on a forged power of attorney and (the respondent) was negligent to H have relied on the representation of (Kalidas) without making further enquiry with (the first appellant)" (see para. 55 of the judgment of the Court of Appeal) that "the appellants' burden of proving forgery and negligence was only on a balance of probabilities" (see para. 57 of the judgment of the Court of Appeal) and that "(the first appellant's) pleaded case against the I (respondent) was not premised on fraud but forgery and negligence ... " (see para. 73 of the judgment of the Court of Appeal). The respondent

submitted that both forgery and fraud were pleaded and that the appellants could not proceed on forgery alone. Indeed, both forgery and penipuan could have been pleaded. But forgery is a fraud. In pleading forgery, the appellants could not avoid the facts of the fraud. But whatever the case, it was nonetheless clear that the pleaded defence was forgery. The appellants' case "was premised on forgery and not fraud" (see para. 73 of the judgment of the Court of Appeal). The penipuan (cheat) that was pleaded was not a separate and distinct defence. There was no arguable merit in the argument that the appellants had departed from the pleaded defence.

[90] There was however irrefutable merit in the argument that the courts below took the stand that the opinion evidence of a handwriting expert is indispensable in forgery cases. When the trial court held "walaupun (first appellant) menafikan bahawa tandatangan di exh. P10 (power of attorney) adalah kepunyaannya, tidak ada keterangan dikemukakan ke mahkamah untuk membuktikan bahawa tandatangan itu bukan milik (first appellant)" (see para. 46 of the judgment of the trial court), it just revealed that at the back of the mind of the trial court, the denial of the first appellant was not evidenced that the impugned signature was a forgery. At para. 69 of its judgment, the Court of Appeal said that the trial court "found that the (first appellant) had not produced any cogent and credible evidence other than his oral testimony to prove that his signature on the impugned PA was a forgery. (The trial court) was of the view that in the absence of any forensic expert's evidence ... (the first appellant's) oral evidence was not sufficient in law to discharge his burden of proving that his signature on the said PA was a forgery". But in that attempt to improve it for the trial court, by reading "no evidence" as "no cogent and credible evidence", the Court of Appeal failed to distance itself from "the view that in the absence of any forensic expert's evidence ... (the first appellant's) oral evidence was not sufficient in law to discharge his burden of proving that his signature on the said PA was a forgery". In not distancing itself, the Court of Appeal effectively endorsed the view that only the presence of a forensic expert's evidence was sufficient in law to discharge the burden of proving that the impugned signature was a forgery.

[91] Inadvertent or not, the courts below plainly held that only the evidence of a forensic expert was sufficient in law to prove the alleged forgery. "But opinion as to handwriting is not confined to experts, but may be given by any person who is duly acquainted with it. It is not necessary to examine a handwriting expert in every case of disputed writing. No adverse inference can be drawn against a party from the fact that the opinion of the handwriting expert has not been obtained ... the principal fact or *factum probandum* may be proved indirectly by means of certain inferences drawn from *factum probans*, ie, the evidentiary facts. To put it differently,

circumstantial evidence is not direct to the point in issue, but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together, they form a chain of circumstances from which the existence of the principal act can be legally inferred or presumed" (*Woodroffe and Amir Ali supra* vol. 2 at p. 2236). "The modes of proof envisaged in ss. 45 and 47 of the Act are not exclusive for proving the genuineness or authorship of a document" (*Woodroffe and Amir Ali supra* vol. 2 at p. 2237). Comparison may be made, by a handwriting expert under s. 45 of the Evidence Act, by anyone familiar with the handwriting of the person concerned as provided by s. 47 of the Evidence Act, or by the court itself. "As a matter of extreme caution and judicial sobriety, the court should not normally, take upon itself the responsibility of comparing the disputed signature with that of the admitted signature or handwriting and in the event of the slightest doubt, leave the matter to the wisdom of the experts. But this does not mean that the court does not have any power to compare the disputed signature with the admitted signature. That power is clearly available under s. 73 of the Act" (*Woodroffe and Amir Ali supra* vol. 2 at p. 2236). But "if the feature of writing and signature on the documents are so glaring, that the court can form an opinion by itself either way, further exercise under s. 45 may virtually become unnecessary or futile" (W*oodroffe and Amir Ali supra* vol. 2 at p. 2248). That was practically said in *Siaw Kim Seong v. Siew Swee Yin & Anor* [2008] 5 CLJ 441; [2009] 1 MLJ 349, where the supposed signatures of the plaintiff did not match his admitted signatures upon a cursory visual examination, and where it was said by the Court of Appeal per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court, that the trial judge ought to have acted under s. 73(1) of the Evidence Act 1950 and made the comparison himself and that "had the judge undertaken such an examination he would have concluded, even without the aid of an expert, that the signatures appearing on the assignment and the transfer were plain and undisguised forgeries". It should be clear enough that a finding of forgery could be made without the opinion evidence of a handwriting expert, be it in civil (*AGS Harta Sdn Bhd v. Liew Yok Yin*) or in criminal proceedings (*Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101; [1983] 2 MLJ 232 at 277).

[92] There was no opinion evidence from a handwriting expert. Yet the courts below should have considered the totality of the evidence, the evidentiary facts and made the inferences, and not just dismissed them as being of no probative value. It is true that there was no direct evidence on the fair market value of the said land. But the two offers of RM10m for the said land, the first from a company in which Kalidas was a director and the second from Kalidas himself, were nonetheless indicative evidence of its value. That offer from Kalidas also raised the improbability that Kalidas, if

indeed he was the true attorney of the first appellant and so as a true attorney would act in good faith and conscience, could have sold the said land at half the price that he offered the first appellant. Kalidas requested for the title of the said land from the first appellant. Hence, Kalidas should know that the title was in the possession of the first appellant and not lost. Yet there was an application for a replacement title, premised on the ground that the title was lost. The second SPA was also an evidentiary fact that indicated that something was not right. Kalidas should know that he had signed an agreement to sell the said land to the respondent. Yet three weeks after he signed the SPA, Kalidas purported to have signed an agreement to purchase the same said land from the first appellant at a fraction (RM770,570) of the sale price (RM5,650,862.09) that he had already secured from the respondent. But if Kalidas were indeed the true attorney of the first appellant and had sold the said land to the respondent, why would Kalidas purchase the same land from the first appellant? Kalidas should purchase the said land from the respondent, if it were true that it had been sold to the respondent. How could a true attorney purchase from his principal the same property and for a fraction of the price that he as attorney for his principal had sold? If the SPA were valid and binding as contended by Kalidas, the first appellant would be entitled to that said RM5,650,862.09. Kalidas should know that. So, how could it be that Kalidas would execute the second SPA, where the stated purchase price was a fraction of what the first appellant should be entitled, that is if the said SPA was valid and binding? It would not add up, unless Kalidas knew that the said SPA was not valid and that the said land had not been sold to the respondent but was still the property of the deceased. Fairly said, no question could be answered in favour of the impugned PA. Our examination of the impugned PA only fortified our suspicion that the impugned PA could not be genuine. If the impugned PA were genuine, it would not be infested with those "absurdities" in its content. The impugned PA was intituled "an agreement", which is certainly not how a power of attorney should be intituled. That could be put down to bad drafting. But bad drafting would not explain away the gibberish in para. 2 of the impugned PA which learned counsel for the appellants submitted had no relevance to the sale of a Malaysian property, or in para. 4 of the impugned PA which stated the Malaysian Government paid Indian Rupees (Indian RS10,000), a paltry sum at that, for the acquisition of 2.5 acres of the said land that the first appellant had asked for RM6.00 psf, which asinine content suggested that the impugned PA could not have been professionally drafted and would have been drafted, or should it be crafted, without proper instructions, particularly on the compensation sum, from the person who knew that detail. In land acquisition proceedings, the compensation sum would not be indorsed on the document of title. A search of the title would not reveal the compensation sum. Only the acquiring authority and landowner would know

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the sum of compensation. But the impugned PA could not have stated the actual compensation sum. That suggested that whoever instructed the preparation of the impugned PA had no inkling of the compensation sum, which further suggested that whoever instructed the preparation of the impugned PA would not have been the first appellant. Perhaps, for the sake of argument, let it be accepted that the impugned PA was genuine. But if the impugned PA were genuine, then how could it be explained that there was an application (by solicitors for the respondent, according to the Registrar of Titles) for a replacement title premised on the lie that the title was lost, and or that a non-genuine title was presented for registration of the transfer to the respondent? There should not be an application for a replacement title if the impugned PA were genuine. Also, the title presented for registration of transfer to the respondent could not be a fake if the impugned PA were genuine. Kalidas could obtain the title from the first respondent, that is, if the impugned PA were genuine. Again, it would not add up, unless Kalidas knew that he would not be able to obtain the title from the first appellant. In short, all reasonable inferences drawn from the evidentiary facts were stacked against genuineness of the impugned PA. Rather, they only pointed to a grand scheme of fraud and deception. It was argued that the photographs and witnesses who were at the presentation ceremony evinced that the first appellant personally handed the impugned PA to Kalidas. But what those photographs actually showed was disputed. The evidence of the witnesses at the presentation ceremony, who obviously were on the side of Kalidas, could not prevail over the irrefutable evidentiary facts, namely the two offers, the option, the request for the title, the application for a replacement title premised on a lie, and the "tidak sah" title that was presented for registration of transfer to the respondent. The testimony of a witness, or even the testimonies of witnesses, could not prevail over the inferences drawn from the total body of evidence. In the final analysis, there were two contrary versions, genuine versus forgery. But only the version of forgery was not at odds with the indirect evidence. On the balance of probabilities, forgery was proved. But as said, the respondent had not made out a *prima facie* claim, and the finding of forgery is only for the sake of completeness.

[93] We have covered the ground to answer the leave questions, but in the following terms:

Leave question 1 - Whether a complaint of forgery in civil proceedings is necessarily in law a complaint of fraud?

Answer: A complaint of forgery is a complaint of a fraud.

Leave question 2 - Whether it is correct in law for a court to treat a complaint of forgery as a complaint of fraud given the differing standards of proof presently in civil proceedings between forgery and fraud?

Answer: A complaint of forgery is a complaint of a fraud, regardless of any difference, but after *Sinnaiyah* there is none, in the standard of proof.

Leave question 3 - Whether a case of forgery can only be proved by means of the opinion of a handwriting expert?

Answer: Negative.

Leave question 4 - Whether it is correct in law to cast the burden of proving that the sale of a property was not genuine on the plaintiff or alleged vendor?

Answer: The burden and onus to prove that a sale is genuine is on the pursuer, that is, the party who asserts that the sale is genuine.

Leave question 5 - Arising from the question above, whether the correct position in law is that the burden of proving that he is a *bona fide* purchaser for value without notice is rightfully to be placed on the purchaser?

Answer: Affirmative. But on the facts, whether the respondent was a *bona fide* purchaser was wholly immaterial.

Leave question 6 - Whether a *bona fide* purchaser for value can be registered as a proprietor of a land in a situation where a formal transmission from a deceased to a personal representative pursuant to s. 346(5) of the National Land Code was not registered?

Answer: Academic to the result and need not be answered.

[94] An appellate court should be slow to disturb the findings of a trial court. But it should be equally said that an appellate court should not hesitate to disturb the findings of a trial court if there were failure on the part of the court to appreciate the issues and or evidence, to properly and adequately evaluate the evidence, to make the proper findings and inferences or deductions, to give reasons, and or to apply the correct law to the facts. In the instant case, the courts below erred on the burden of proof, on the onus of proof, and on the standard of proof. The courts below also got it wrong on the adverse inference, on the validity of the impugned PA, on the proviso to s. 340 of the NLC, on *bona fide* purchaser in relation to the indefeasibility of title, and even on the evidence. Given the magnitude and scale of the errors, there should not be any likelihood that the decision of the courts below could remain undisturbed.

[95] For the reasons above, we unanimously allow this appeal with costs, here and below, to the appellants. We dismiss the claim of the respondent against the appellants and set aside the order of specific performance, and the orders (a)(i), (d), (d)(i) and (f)(as they pertained to the appellants) of the trial court, and the orders of the Court of Appeal. Lastly, we order the Registrar of Titles (i) to cancel the title of the respondent as proprietor of the said land

A (at para. 74 of its judgment, the Court of Appeal informed that the respondent had been registered as proprietor of the said land pursuant to the order of the trial court), (ii) to restore the deceased as proprietor of the said land on the document of title, and (iii) to make the necessary memorials.

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